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REPORTS

OF

CASES

ARGUED AND DETERMI

IN THE

SUPRE

LAW SCHOOL
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STATE OF VERMONT

REPORTED BY THE JUDGES OF SAID COURT, AGREEABL
LAW OF THE STATE.

VOL. V.

MIDDLEBURY:
KNAPP & JEWETT.....PRINTERS.

1834.

Justices of the Supreme Court, and, ex officio, *Chancellors of the Court of Chancery in the State of Vermont, during the time embraced in these Reports.*

For the year commencing in October, 1830, and ending in October, 1831.

TITUS HUTCHINSON, *Chief Justice.*
CHARLES K: WILLIAMS,
STEPHEN ROYCE, Jun.
EPHRAIM PADDOCK,
JOHN. C. THOMPSON,*
} *Assistant Justices.*

For the year commencing in October, 1831, and ending in October, 1832.

TITUS HUTCHINSON, *Chief Justice.*
CHARLES K. WILLIAMS,
STEPHEN ROYCE, Jun.
NICHOLAS BAYLIES,
SAMUEL S. PHELPS,
} *Assistant Justices.*

For the year commencing in October, 1832, and ending in October, 1833.

TITUS HUTCHINSON, *Chief Justice.*
CHARLES K. WILLIAMS,
STEPHEN ROYCE, Jun.
NICHOLAS BAYLIES,
SAMUEL S. PHELPS,
} *Assistant Justices.*

**Judge Thompson deceased in June, 1831.*

ERRATA.

PAGE 109, on the margin, for ',1831," read 1833.
" 145, line 4 from bottom, for " under," read *aside*.
" 148, line 19 from top, for " Whither," read *Whether*.
" 160, line 3 from bottom, for " of " read *at*.
" 165, line 10 from top, for " 6" read 5.
" 165, line 13 from top, for "5" read 6.
" 279, line 3 from bottom, for " County," read *City*.
" 476, line 2 from top, for " now" read *no*.
" 477, line 20 from bottom, for " mast," read *most*.
" 494, line 2 from top in marginal note, for " or" read *on*.

AN

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

ISAAC RICHARDSON *vs.* JOSEPH H. DORR.

CALEDONIA, *March*, 1833.

Richardson vs. Dorr.

If a person take possession of land under a vendue deed, twenty-three years *old*, without previously setting up any claim of title to said land, and holds possession five years under said deed, the age of the deed, and possession under it, raise no presumption, that the deed is a valid one.

Where a statute makes it the duty of a sheriff to collect taxes, he must perform every pre-requisite, or his deed will be void.

A collector of taxes, who has given a vendue-deed of lands, which he sold, and has covenanted in such deed, *to warrant and defend the same*, is interested, and cannot be a witness to support the title without a release.

A copy of vendue sales, lodged in the county clerk's office, which carried *internal* evidence, that it was not left in said office within thirty days next after the sales, and was not attested by the collector, as a true copy, as the statute required, was rightly excluded by the county court from going to the jury as evidence.

Where A. contracts with B. that he is lawfully seised in fee of the premises—to satisfy the words of this covenant, A. must show that he had an estate in *fee* in the land which he deeded, and was seised of the same, and had a right of possession.—Showing an estate less than a fee; or a tortious possession would be showing a breach of the covenant. In such case the rule of damages is the consideration paid for the land, and interest of the money; but there are exceptions to this rule.

The covenant against incumbrances is broken by an out-standing mortgage upon the land, when the deed was given.

The rule of damages is, the money paid by the plaintiff to remove the incumbrance—if nothing was paid, the plaintiff should recover only nominal damages.

The covenant for title is broken, if the grantor had not the very estate in quantity and quality, which he covenanted he had a right to convey.

The decisions of the courts in *Massachusetts* and *New-Hampshire*, respecting the personal covenants in a deed of land, are questioned.

CALEDONIA, *March*, 1833.

Richardson vs. Dorr.

This was an action of *covenant broken*, brought on the covenants contained in the defendant's deed to the plaintiff, of lands in Charleston, late Navy, in Orleans County. Issue to the country.

The writ, pleadings, deeds, and all papers used on the trial, are made a part of the case. The defendant gave in evidence a deed, from *John Rankin*, Sheriff and Collector, of the lands in question, dated Nov. 21, 1799, and read the statute granting the tax upon which said lands were sold, and gave evidence to show that the defendant took possession of said lands under said deed in the spring of 1822, and that the plaintiff succeeded to said possession under the deed including the covenant declared upon, and then rested his case—contending that the deed being of so ancient a date, and possession having been taken under said deed, and the plaintiff not having been molested, and disturbed in said possession, the law would intend, that the Sheriff's sale was regular, *prima facie*. But the Court decided that the deed and possession, though quiet and peaceable, did not furnish a defence in said action. The defendant then gave evidence of the warrant of the Treasurer of the State to *John Rankin*, Sheriff and Collector of said tax; and of the Surveyor General's certificate of the quantity of land in the township of Navy, and that Navy was then an unorganized township; and of the application of the Sheriff and Collector upon receipt of said warrant, to the Secretary of the Governor and Council for a list of the names of the proprietors of said Navy; and also of a list of the assessment of said tax on said Navy by said Sheriff and Collector. The defendant also gave evidence tending to prove, that the several newspapers containing the advertisement of said sale, were not in the office of the Clerk of Caledonia County Court; nor were any records of said advertisement to be found in said office. The defendant then gave evidence of the advertisement of the sale of lands by producing the several newspapers containing the original advertisement, to wit: the Vermont Gazette, Spooner's Journal, and Rutland Herald; and also of the sale of the lands in question to the defendant, and of the lands not redeemed; and of the deeding of said lands; and of a certified copy of said sales returned to the Clerk aforesaid for record; and of lodging the several

newspapers containing the publication of said original advertisement within thirty days next after the sale by said Sheriff and Collector, as the law directs. The defendant gave evidence tending to show that there was in the office of said Clerk, in 1806 or 1807, a book of records purporting to be the records of the aforesaid sales.—But on this point the evidence was contradictory.

The defendant here rested his case, contending that he had in law made out a defence to said action. But the Court decided, that the showing, and evidence produced by the defendant, furnished no defence to the plaintiff's action. The defendant then contended that under the circumstances of the case, the plaintiff was entitled to but nominal damages. But the Court decided, and so instructed the jury, that the plaintiff was entitled to the consideration money paid, and the interest, as damages, and instructed the jury to return a verdict accordingly. To which decisions of the Court, and directions to the jury, the defendent excepts.—Exceptions allowed. The evidence given of a certified copy of said sales, returned to the office of said Clerk, was the parol testimony of *John Rankin*, the Sheriff, and Collector of said tax.

Isaac Fletcher, Esq. Attorney for Defendant, proceeded as follows:—

This is covenant broken, for lands in Charleston, Orleans County. *Plea*, That the defendant (grantor) at the time of making the deed was seised. *Replication*, That he was *not*, and issue closed.

To support the issue on the part of the defendant, he offered a vendue deed, executed by *John Rankin*, Sheriff and Collector, dated Nov. 21, 1799, of the premises conveyed by said deed, duly acknowledged and recorded, and gave evidence tending to prove, that in the spring of 1822, he took possession of the premises under said deed, and that it was continued uninterrupted up to the time of executing the deed to the plaintiff—that the plaintiff succeeded to his title and possession under his deed, and that the plaintiff has never been disturbed in his possession.

The defendent here contended that he had made out a *prima facie* defence, and that to recover, the burthen of proof was on the part of the plaintiff.

CALEDONIA, *March*, 1833.

Richardson vs. Durr.

This is the equity of the case: The plaintiff is entitled to recover only in case of actual damage. Here is no breach of covenant in contemplation of law for want of title in the grantor. The possession of the plaintiff has never been disturbed, nor does the law *intend* that that it ever will be. For ought appears, the title of the covenantor is good, and the law will presume a right, where the exercise and enjoyment of that right is notorious and undisputed.

Here is a right claimed under an ancient vendue. The deed is of thirty-four years standing. During all that time taxes have been paid on the land by those claiming title under this deed. Possession has been taken under the grant, and enjoyed for more than ten years. This possession has been uninterrupted, quiet and peaceable, without claim or hindrance; and there is no presumption arising that the plaintiff will ever be disturbed; but the presumption in law is, that the plaintiff's title is perfect, and the law often presumes a grant from acquiescence and lapse of time. 3 *Starkie's Ev.* 1216 (*n*)—*do.* 1221.—*Bull N. P.* 255.—10 *John. Jackson* vs. *McCall*, 377.—9 *John. Doedem* vs. *Phelps*, 169, 171.—14 *Mass. Stockbridge* vs. *Stockbridge*, 257.

The defendant took possession under his deed, and gave actual possession to the plaintiff. If this be not conclusive evidence of a valid seizin in the covenantor, it is at least *prima facie* evidence, from which the law will intend that all outstanding titles and claims have been quieted, and the covenant of seizin not broken. 4 *Dane.* 21, *sec.* 3. *do.* 344, *sec.* 8.—4 *Mass.* 410, 442—*do.* 627.—16 *Mass.* 213.

But I consider that all the proceedings of the Sheriff in collecting the tax, and also in deeding to the defendant, were strictly in pursuance of the act laying the one cent tax. *(See Tomlin's Ed. 2 vol.* 256.) By this statute it is made the duty of the County Clerk to record the sales, but it is to be noted that no time is specified within which the Clerk is to make this record, nor is it made the duty of the Collector to cause it to be done. If the statute had imposed this duty upon the Collector, or directed it to be made up before the time of forfeiture accrued, and the time of deeding had arrived, it might have deserved a different consideration.

The defendant holds under the grant of the Collector. He acts as an agent of government. The law will intend that he has complied with all the legal requisites, till the contrary appear. This is sufficiently evidenced being under his oath of office; and there can no presumption arise to the contrary.

The law, in 1797, had made no provision for perpetuating any other evidence than the sales and the newspapers. It could not be expected, that any other evidence should be preserved. But fortunately the Sheriff and Collector is living, and can testify to his doings.

Thirty-five years have elapsed since the transaction. All other claims of title have been abandoned. This is presumption violent that the vendue of *Rankin* was regular. From this acquiescence its legality may be presumed. At least, it ought to be considered as *prima facie* legal in absence of all claim or evidence to the contrary.

But the plaintiff has shewn no actual damage. His damage, if any, *is in futuro*. It *may*, or *may not* happen. He has his indemnity upon the covenant of warranty. Actual, not imaginary damage, ought to be the rule of recovery. In contemplation of law, no damage whatever has been sustained. He is in quiet and peaceable possession of the premises. Even if the right be inchoate, shortly the title will be perfect. The plaintiff has no equity.

A recovery upon the covenant of seizin would be no bar to a recovery upon the covenant of warranty. This is a covenant running with the land. If the plaintiff should grant the premises, and his grantee be ousted, the defendant would be liable to him for the full value of the premises at the time of ouster. This would be refunding the consideration money and paying the full value of the land This would be manifestly inequitable and unjust.

If an action will lie at all, nominal damages, in absence of all proof to the contrary, must be the rule of recovery. 4 *Dane*, 346; *Sec.* 9.—4 *Mass. Rep. Prescott* vs. *Truman*, 627.—3 *Vermont Rep. Catlin* vs. *Hurlburt*, 403—408.

Charles Davis, Esq. Attorney for Plaintiff, contended as follows:—

It appears from the pleadings, deeds, &c. made a part of this case—that the action was *covenant broken*, in which

CALEDONIA. *March*, 1833.

Richardson vs. Dorr.

plaintiff claims to recover the consideration money and interest embraced in the deed mentioned in his declaration, on the ground that the defendant had no title to the land he undertook to convey. The defendant contends, first, that a vendue deed from *John Rankin*, Sheriff and Collector of the one cent tax, imposed by act of Nov. 10, 1797, on the unorganized towns in Caledonia County, of the lands in question, which deed is dated Nov. 21, 1799; together with the production of said act, and proof that he took possession in 1822, and transferred possession to plaintiff at the time of his conveyance in April, 1827, and plaintiff having hitherto remained undisturbed altogether, create a legal presumption that all the said Sheriff's proceedings anterior to the execution of said deed were legal. What most of these facts have to do with the conclusion, it is difficult to see. If the defendant had taken possession at the date of his deed from *Rankin*, or at any other time more than 15 years previous to the date of his deed to plaintiff, he might have well contended that he had not broken his covenants, and of course would have had no occasion to prove or presume any thing with respect to the Sheriff's proceedings.

But it is a new idea that the mere antiquity of the deed unaccompanied by possession, creates a title by possession, or in the case of a vendue deed dispenses with the necessity of shewing the authority under which one man conveys another's land. There is no statute of limitations applicable to such a subject. Possession for a sufficient length of time, with or without a deed, might have availed the defendant; but a deed alone, or with a possession of five years only, cannot. The defendant then offers a mass of papers and other testimony in relation to said vendue, against which numerous objections are made by plaintiff, a few only of which, and the most important, will it be necessary or practicable to notice here. These are, that the original advertisements required to be published in the Bennington, Rutland and Windsor papers, by the act required to be lodged with the Clerk within 30 days of sale, are not produced from his office.—Proof by the production of papers in private custody, purporting to have been printed in those towns, and to contain said advertisements, is not admissible, though the Clerk testifies that there are none

CALEDONIA, *March*, 1833.

Richardson vs. Dorr.

such in his office, and the late Sheriff testifies that he lodged them there seasonably—that the papers produced, if admissible, would not shew a compliance with the act, which required a successive publication for three weeks, the last to be 10 days before sale. The Bennington and Rutland papers contain an advertisement dated April 1, 1798—the Windsor paper has one of similar import, dated April 2, published in two successive numbers, and in an extra half sheet—that there is no regular certified copy of the sales on record in the Clerk's office, as required by the 20th section of the act—that parol proof that the Sheriff and Collector lodged a copy there seasonably, is not to be received—that the original book of sales is not admissible as evidence without having been recorded—that the book purporting to be a copy now in the Clerk's office, referred to in the exceptions, is not properly attested by said Sheriff and Collector—is not recorded, and contains no evidence of the time when it was left, and shews that sales were made at 9 o'clock A. M. whereas the act requires them to have been *between* 9 and sunset, and shews no adjournment from the 5th to the 6th of June, and yet the land in question was sold on the 8th.

With such numerous and important defects in defendant's evidence of a regular sale, the Court could not come to any other conclusion than they did, that he had failed to make a title under said vendue. As to the necessity of shewing perfect records of what the law requires to be recorded, see 2 Vt. Rep. 319, *Coit* vs. *Wells*. The defendant finally contends, that the Court erred in not directing the jury that under the circumstances of this case, plaintiff was entitled to only nominal damages. As to the general doctrine with respect to the covenants of seizin, and the rule of damages in such case, though heretofore often made the subject of much discussion in this State, it is unnecessary to go further back than the case of *Catlin* vs. *Hurlbut*, 3d Vt. Rep. 403, which has deliberately settled or rather re-settled the true doctrine. The amount of damages is the consideration and interest. The case of *Garfield* vs. *Williams*, 2 Vt. Rep. 327, where nominal damages only were given, has no application to the present. The plaintiff had been so long in undisturbed possession as to have acquired a perfect title at the commencement of his suit, and on this ground

CALEDONIA, *March*, 1833.

Richardson vs. Dorr.

alone it was that the decision was made. In this case the plaintiff either has already or will have to purchase in the title of the true owner or lose his land.

The opinion of the Court was delivered by

BAYLIES, J.—This is an action of *covenant broken*, brought on the covenants contained in the deed from *Dorr*, the defendant, to *Richardson*, the plaintiff, dated April 7, 1827, of the whole lot number 75, (except 100 acres previously sold by said *Dorr* to *Simeon Stearns)* drawn to the first Division of the Right of *Charles Jenkins*, in the town of Charleston, late Navy, in the County of Orleans. The covenants are in these words: "I am lawfully seised in fee of the "aforesaid premises; that they are free of all incumbran- "ces; that I have good right to sell and convey the same "to the said *Isaac Richardson*." The plea is, that the defendant has kept and performed all and each of the covenants contained in said deed, to wit, at *Danville* aforesaid; that the defendant, at the time of the delivery of said deed to the plaintiff, was lawfully seized in fee of the said granted premises—that they were free from all incumbrances, and that he had good right to sell and convey the same to the plaintiff.——Issue to the country.

The plaintiff, to support the issue on his part, gave in evidence to the jury his deed from the defendant, containing said covenants. And the defendant, to support the issue on his part, gave in evidence a deed from Col. *John Rankin* to the defendant of the land in question, dated the 21st day of November, 1799, and acknowledged and recorded the same day. This deed, on the face of it, purports to be a vendue deed, executed by Col. *Rankin*, as Sheriff of Caledonia County, and Collector of the one cent tax, laid to support government during the year 1797, and for other purposes: this act was passed 10th Nov. 1797.—(See Tomlin's Ed. vol. 2, p. 256.) The consideration of this deed, as expressed, was $3, 56, being the amount of the tax on the lands in question, and costs of sale. And it appears that the defendant took possession of said lands under this deed, in the spring of 1822, and continued his possession till he deeded to the plaintiff, and put him into possession. When the defendant took possession, his vendue deed had existed 23 years; and he now contends that

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from the age of this deed, and his possession under it, it is *presumed* he had a good title, when he deeded to the plaintiff; and *this presumption* of title is to stand, until it is overpowered by evidence adduced by the plaintiff.

But the Court cannot recognize this as law: the defendant not setting up a claim of title, nor taking possession of the lands under his vendue deed for twenty-three years, if any *presumption* can be raised from these facts, it is a *presumption* against the defendant's title. The defendant must show, that the Sheriff, in the collection of the tax, did those *essential* things, which the law required him to perform, as Collector, before he executed his deed to the defendant, if he omitted any *pre-requisite*, the deed is void.

The 20th section of the aforesaid act required, "That "the several Collectors should, within thirty days next after "the ending of such vendues for the sale of lands, lodge a "true and attested copy of such sales, together with their "advertisements thereof, with the several town, or County "Clerks, as the case may be; whose duty it shall be to re-"cord the same at the expense of such Collectors." To prove that this section was complied with by the Collector, the Collector himself, Col. *Rankin*, was offered by the defendant, as a witness, and testified, that he left a copy of his sales, and the newspapers containing the advertisement with the County Clerk, within thirty days, as required by law; but *he thinks, on looking at it, that the copy now in the Clerk's office is not the one he left.* Here I would observe, that Col. *Rankin* was the only witness to prove these facts, and he did not testify that he requested the Clerk to record the copy which he left, at *his expense*; nor that he had ever seen such record.

As the validity of this vendue title was called in question, and Col. *Rankin*, as Collector, had covenanted, in his deed to the defendant thus,—"that I will, in my capacity aforesaid, warrant and defend said land, to him the said *Joseph H. Dorr*, his heirs and assigns, against the lawful claims or demands of any person whomsoever," he was interested in the *particular question* that was agitated, and could not testify, if the plaintiff had objected, without a release from the defendant.

Gov. *Palmer* also testified, that, "on his taking possesson of the Clerk's office, in the year 1806 or 1807, he found

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every thing in the office in great confusion, and spent much time in arranging papers, records, &c.—having overhauled every book and paper in the office—that he never saw the newspapers in the office which Col. *Rankin* had sworn he left there, and that he had some recollection, or impression, that at some period he had seen a *blue book*, purporting to be a book of said vendue sales, but could say nothing definite about it—could not say what became of it; and did not know but the book from the Clerk's office was the one he had seen."

Col. *Rankin* does not testify *positively*; but "he *thinks*, on looking at it, that the copy now in the Clerk's office is *not* the one he left." This copy was offered in evidence on trial, but was rejected by the Court. Now let us inquire, 1st, Was this copy left by the Collector in the County Clerk's office within thirty days next after the vendue sales, to be recorded? 2d, Is it attested by the Collector, as a true copy of the sales? On the title page of this copy are written these words: "A record of the collection before sale, and the sale of lands of the unorganized Towns and Gores in the County of Caledonia, for the Cent State Tax, granted by the General Assembly of the State of Vermont, at Windsor, in October, 1797, by *John Rankin*, Esq. Sheriff of said County, and Collector of said Tax."

On the first page is copied the Treasurer's Warrant to said Sheriff to collect said tax, on the lands described.—Then comes the Sheriff's Advertisement, published in the newspapers. Then each subsequent page is divided into columns differently headed—some relating to the sales of land—some to the redemption of land, after it was sold; and some to the deeding of land, not redeemed.

On the last page is the following certificate: "State of Vermont, Caledonia County *ss.* County Clerk's Office, July 1, 1805. I hereby certify that the foregoing are true copies of the Record of John Rankin's collection and sale of the unorganized Towns and Gores in said County, at the Cent tax, granted by the Legislature, at Windsor, in October 1797. Attest, Elkanah Phelps, Clerk."

This copy carries *internal* evidence, that it was not left in the County Clerk's office within thirty days next after the sales, to be recorded; such are the *entries* in the six last columns on each page: these *entries* relate to the redemp-

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tion of land sold, and to the deeding of land not redeemed; none of which took place within thirty days next after the sales. The deeding, by statute, could not be till a year after the sales: And from these entries, I infer, that the copy was made and left, in the County Clerk's office, after the lands were deeded; probably about the time the Clerk made his certificate. Moreover, it does not appear that the Collector, under his hand, ever attested this copy, as a true copy of his sales. The County Court did right in not admitting this copy to go to the jury as evidence. This copy being excluded, there was no *legal* evidence, from which the jury could find, that the Collector complied with the requisitions of the 20th section of the act aforesaid; and, without such compliance, the Collector had no power to execute his deed to the defendant of the lands in question. The defendant does not pretend he had any other title than by this deed, and actual possession of the land, under it, for about five years, claiming in fee. As the defendant derived nothing from the deed but colour of title, was he enabled, by *his possession* and *claiming in fee*, to give a deed of the land which would convey an estate in fee? Certainly not. Then he has not kept the covenants contained in his deed upon which he is sued.—The first is, "I am lawfully seised in fee of the premises." This is called the *covenant of seisin*, and, to satisfy its words, the defendant must show, that, when he made this covenant, he had, not only an estate in fee in the land which he deeded, but also, that he was seised of the same, and had a right to the possession. If the defendant had an estate in the land, less than a fee, or was seised by wrong, he was not "lawfully seised in fee of said premises," and broke his covenant, when he made his deed. The general rule by which to estimate the damages for the breach of this covenant is the consideration paid for the land, and interest; but to this rule there are exceptions.—(*Garfield* vs. *Williams*, 2 Vt. Rep. 327—*Catlin* vs. *Hurlbut*, 3 Vt. Rep. 403—4 Kent's Com. 462, 464.)

The second covenant is, "that they are free of all encumbrances."—This is called, *a covenant against encumbrances*, and is broken by an out-standing mortgage upon the land, which had not been paid. The rule of damages, in some of the States is, the money paid by the plaintiff to the

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mortgagee, to clear off the mortgage; but if the plaintiff has paid nothing, he can recover only nominal damages.—(*Delavergen* vs. *Norris*, 7 J. R. 350.—*Stanard* vs. *Eldridge*, 16 J. R. 254.—*Prescott* vs. *Trueman*, 4 Mass. R. 627.)

This rule has often been recognized by our Courts as law. But, beside mortgages, there may be other encumbrances upon the land, for which the grantee should recover damages, on this covenant—(See 2 Mass. Rep. 97—4 Mass. Rep. 627.)

The third covenant is, "that I have good right to sell and convey the same to the said *Isaac Richardson* as aforesaid." This is called *a covenant for title*, "and is an assurance to the purchaser, that the grantor has the very estate, in quantity and quality, which he purports to convey, viz: in this case, an indefeasible estate in fee simple."—(*Howell* vs. *Richards*, 11 East. 642.) If this assurance be false, the covenant is broken, and the purchaser has his remedy for the damages which he has sustained.

These covenants are of vast importance to the purchaser of lands, to secure him against the misrepresentations of the vendor, as to his title. They are *personal* covenants, and are broken as soon as the deed is given, if broken at all, and are not assignable. We do not construe these covenants as they have been construed in some of our sister States. It has been said by Ch. J. *Parsons*, in *Manton* vs. *Hobbs*, 2 Mass. Rep. 433, that, to sustain a covenant of seisin, it is not necessary "to show seisin under an indefeasible title; that a seisin in fact is sufficient; and that if, at the time the grantor executed the deed, he had the exclusive possession of the premises, *claiming* the same in fee simple, by a title adverse to the owner, he was seised in fee, and had good right to convey." To the same effect were the opinions expressed in *Twambly* vs. *Hinley*, 4 Mass. Rep. 441, and *Prescott* vs. *Trueman*, 4 Mass. Rep. 627. In *Willard* vs. *Twitchel*, 1 N. H. Rep. 177, the Court say, "The covenants in our deeds that the grantor is the lawful owner, that he is seised in fee, and that he has good right to sell and convey, have always received a construction that makes them merely synonymous. Each of them amounts only to a stipulation, that the grantor has such a seisin that the land will pass by his deed. If the grantor, at the time of the conveyance, has actual seisin, whether by right or by

wrong—whether under a valid title or by disseisin, the land will pass by his deed, and neither of these covenants is broken."

I cannot believe, that these decisions, which were made in *Massachusetts* and *New-Hampshire*, are in accordance with the common law. It is said in Shep. Touch. 170, "If one be seised of land in fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate he doth covenant that he is lawfully seised, or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c. and in truth he hath not, but some other hath an estate in it before; in this case the covenant is broken as soon as it is made." Ch. J. *Hosmer*, in *Lockwood* vs. *Sturdevant*, 6 Conn. Rep. 305, speaking of the cases in *Massachusetts*, says, "I am constrained to observe, that notwithstanding the veneration I entertain for the highly accomplished jurist who expressed the above opinions, I cannot yield to them my assent. That which shows covenants of seisin, and of right to convey, to be broken, is their falsity. If the covenants are true, they remnin inviolate; if they are not true, they are broken. On the same principle, if they are entirely false, they are wholly violated; and if partially untrue, they are broken but in part only. All this is self-evident. Although the covenantor should have had the actual possession of the premises, and an ideal, or imaginary right, founded on a supposed title that was merely colourable, *yet this is not a legal seisin in fee*; and nothing short of this will support a covenant, that the grantor is seised in fee simple, because nothing short of this proves the covenant to have been true. This construction necessarily results from the unequivocal words of the covenantor, and the unquestionable object of the covenant. A seisin in fact of an estate in fee simple, if the word *seisin* intends any thing more than possession, is an expression without meaning, where there is no seisin in law. In the nature of things, there is but one species of seisin in fee, and that necessarily is, the possession of an estate conjoined with such legal interest as the term *fee simple* denotes."

I cannot but accord with the sentiments which are here expressed by Ch. J. *Hosmer*. If we depart from the common law in giving a construction to these personal cove-

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nants, which are usually contained in a deed of land, we may make them mean any thing or nothing. If there be a local law in *Massachusetts* or *New-Hampshire*, by which they expound these covenants, that law is no authority for us.

Judgment of the County Court is affirmed.

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FARRELL CARRIGAN *vs.* JOSEPH HULL.

That it is not error for the Court to instruct the jury, that they may infer fraud in the contract of Defendant and Son, who was a Bankrupt, to pay Plaintiff for his labor, done for Defendant when Plaintiff was a stranger, and the Defendant and his son knew of this Bankruptcy, and did not make it known to the Plaintiff.

This action came up from the County Court for a hearing on the following Bill of exceptions, to wit:

This was an action of Assumpsit for work and labor, as (per writ and declaration, made a part of the case,) will more fully appear. Plea, gen. issue and joinder to the country. The plaintiff introduced testimony, tending to show, that during the summer or fall of 1831, he labored for the defendent on his farm in Danville, about three months, and here rested his case.

The defendant, thereupon, stated to the Court and Jury, that he relied for a defence upon the following facts, viz:— that some time previous to the Plaintiff's commencing said labor, one Sewall Hull contracted with the plaintiff to pay him therefor. Thereupon the defendant introduced the several depositions of Sewall Hull and Lucy Hull, which are made a part of this case. The defendant also introduced other testimony, tending to prove, that the plaintiff, during his time of service, and afterwards, admitted he was employed by Sewall Hull and not by Joseph Hull, and here the defendant rested his defence. The plaintiff then introduced evidence, tending to shew, that, when said supposed contract between the plaintiff and said Sewall Hull was made, the said Sewall had then lately come from Peru to Plattsburgh in the State of New-York, ready to be committed to jail in said Plattsburgh for debt and was waiting there for that purpose, and was poor, and wholly destitute of property: all which was well known to the said Joseph Hull, defendant, who was father of said Sewall

Hull, and was present when said supposed contract was made, at said Plattsburgh, and brought the plaintiff home to Danville with him, to labor on his, the defendant's farm. And there was further evidence tending to shew, *that the plaintiff was a young Irishman, who had just arrived in this country, and was seeking employment, and was a stranger to the defendant and his son Sewall; that, when the supposed contract was made, the plaintiff had no knowledge of the poverty and inability of the said Sewall to pay the plaintiff his wages.* Upon the aforesaid evidence the Court charged the jury, that, if they found the contract to have been made by *Sewall Hull*, to pay the plaintiff for his labor, and that said Sewall was then indebted to said *Joseph Hull*, yet, if they found from said evidence, that said Sewall was then a Bankrupt, and had lately moved to Plattsburgh to be committed to jail for debt, and was wholly unable to pay the plaintiff his wages, or any part of them, and this was well known to the defendant and said Sewall, at the time *of making* said supposed contract, but was unknown to the plaintiff, and neither the defendant, nor said Sewall, then nor subsequently, made known these facts to the plaintiff; but the defendant stood by, while the contract was making, and then brought the plaintiff home with him and set him to work on his the defendant's farm, where the plaintiff performed his three months labor; the jury having found these facts, have a right to infer therefrom, that the said supposed contract between the plaintiff and the said Sewall Hull was fraudulent and void. And, inasmuch as the defendant received the labor of the plaintiff under this contract, the law will imply a promise on his part to pay the plaintiff for his said work and labor, what the plaintiff deserved to have. The Jury returned a verdict for the plaintiff. The defendant excepts to the above charge of the Court. Exceptions allowed and execution ordered to be stayed.

Argument for the Defendant.—We except to the charge of the Court to the Jury.

This charge assumes the Law to be, that the fact of being present at the bargain between Plaintiff and Sewall Hull, and knowing circumstances affecting the ability of said Sewall, to fulfil his contract, and not communicating

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them to plaintiff, though making no misreprentations, and using no arts to divert plaintiff from making full enquiry into them, and without even knowing whether they were not already as well known to the plaintiff, the effect of which is to vacate both the formal contract, made between plaintiff and Sewall Hull, and that between Sewall and defendant, by virtue of which plaintiff's labor was to operate as payment from Sewall to Joseph, and subject defendant to a contract, which he did not make, to pay Plaintiff directly for his labor; and all this without a particle of proof, that plaintiff had first called on Sewall and had been refused payment.

We have ventured to suppose, that the Law is not thus. Although it may be doubtful, whether this form of action could be sustained, if defendant had been guilty of the grossest misrepresentations, by which plaintiff was deceived into the bargain, without the means of being undeceived by inquiry in the neighborhood, the authorities being contradictory on this point—Camp. 4, *Thompson* vs. *Bond;* 3d. Camp. 352, *Read* vs. *Hutchinson*; 3d. Torenton 274, *Hill* vs. *Perrot;* yet we are not disposed to dwell upon this ground. We rather choose to controvert the main position in the charge, with respect to what would constitute fraud in such case. It seems to be a clear principle, that, in ordinary sales of goods and chattels, when opportunity of inspection and examination is equally enjoyed by the parties, the fact of withholding a knowledge of some secret defect from the purchaser by the seller is not a legal fraud, so as to entitle the former to recover in any form of action.—Long on sales, 123; 3 Camp. R 154, *Boglehole* vs. *Walters* and Note as to the phrase 'all defects,' do. 506 *Lekneider et al.* vs. *Heath*, do. 351 *La Neuville* vs. *Nourse*, 4 Taunt. 779, *Pickering* vs. *Dawson;* 1 Pick. R 347 *Lewis, Adr.* vs. *Gouroge et al.* 2 East. 314, *Parkinson* vs. *Lee*, and note (1); 2 Dane. p. 542, § 11. p. 554, § 9.

The rule of course does not apply in those cases where the opportunity of learning the facts is confined to one party, as in case of insurance, where the insured are relied upon entirely for information, and are, therefore, bound to scrupulous accuracy in communicating it. So impor-

tant is the means of knowledge within the reach of the purchaser, that he cannot recover, even on an express warranty, for visible defects. 3 *Bl. Com.* 165. *Bul. N. P.* 31; 2 *Dane p.* 543.

We contend, that the present is a stronger case than the ordinary one of sales of personal property; inasmuch as it was not a contract between plaintiff and defendant at all; and the latter in no way became connected with the transaction, except by receiving plaintiff's labor. Nothing short of unequivocal proof of participation in a fraudulent purpose of procuring plaintiff's labor without reward, ought to charge him. Even upon the supposition, that Sewall Hull intended a fraud, it by no means follows, that defendant was privy to it, and should answer for it. Then, as to the poverty of Sewall, was it not a fact equally accessible to plaintiff as defendant, especially as plaintiff entered into this contract at Plattsburgh, where Sewall re*sided*, and defendant resided at Danville. He had only to make inquiries in the neighborhood, to have learned the facts; and in analogy to the case of sales, if there had been, what there was not in this case, a false affirmation knowingly made by defendant, the plaintiff would not be excusable in neglecting to make the proper inquiries.

The circumstances, that plaintiff was a foreigner recently arrived in the country, and had been only a few days in Plattsburgh, if true, though the only evidence of them is his own declarations, as stated in Lucy Hull's deposition, could make no difference. A few days or even a few hours would be amply sufficient; and especially after he had appealed to defendant to know whether he would in any event be responsible, and been told, that he would not, he seems wholly inexcusable. If he should fail to collect his wages of Sewall Hull, which it does not appear he ever attempted to do, his loss ought to be attributed to his own negligence. There is still a further reason, why defendant's simple neglect to disclose facts within his knowledge ought not to be taken as conclusive evidence of fraud, or indeed any evidence of fraud; which is, that, even if we suppose plaintiff to have been ignorant of Sewall's bankruptcy, there is nothing in the case, which goes to shew defendant's knowledge of this ignorance. It was natural for him to suppose, and he probably did suppose,

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that plaintiff was at least as well acquainted with it, as he himself was; and, if so, there was no occasion for him to to speak of circumstances presumed to be fully known to all concerned. The defendant has been cut off from his defence by a supposed technical fraud, when he is conscious that none was intended by him; and he only desires an opportunity to explain the whole circumstances, which he believes he can do to the satisfaction of any jury.

Argument for the plaintiff.—Fraud vitiates all contracts.

There is but one class of cases, in which a distinction has ever been made between a deceit practiced by means of a suppression of truth, and a fraudulent misrepresentation—and even in that class of cases the distinction is now obsolete. I refer to cases of sales *with all faults*.

It was formerly held, that in such cases, the vendor was not liable for any defect in the article sold, unless he used some artifice to conceal it, or made some misrepresentation with a design to deceive. Hence the decision of the Court in the cases of *Bagleholevs.* *Walters*, 3 Camp. Rep. 154, and *Pickering* vs. *Dawson*, 4 Taunton, 779.

But the general rule of law upon this subject is, that, if there be an intentional concealment, or suppression of material facts in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract. 2 Kent. Com. 377; 8 Mass. 409, Peake's cases, 115; 1 Starkie's Rep. 434; 3 Barn. & Cress. 605; Brod. & Bing. 289.

There is no distinction, in point of justice, equity, morality, or law, between a fraudulent concealment and a wilful misrepresentation.

The transaction must be fair and honest.

The jury under the charge of the Court found fraud and no power of words can so bend this case, as to make it appear otherwise than a foul attempt on the part of the defendant to swindle the plaintiff out of his summer's wages, to get the benefit of his sweat and toil, and then compel him to whistle to the winds for pay.

HUTCHINSON, C. J.—The instructions given to the jury in this case, do not treat the case as involving fraud *per se*; but as a case of evidence, tending to prove facts, from which

the jury might infer the further fact of a fraudulent intention in the defendant and his son Sewall, to procure the plaintiff to labor for the defendant, with no prospect of ever getting any pay for his labor. The question now presented, is, whether the testimony, if believed, proved facts, from which this fraud might legally be inferred.

It seems, that the plaintiff had but lately arrived at Plattsburgh from Ireland, when this contract was made; and that the said Sewall Hull had then lately come there from Peru, with expectation of being committed to prison for debt. The testimony is, that Sewall was then a Bankrupt, and this well known to him and to the defendant.— There is no intimation that the plaintiff knew it. It is said the plaintiff had the means of knowledge. What these means were, or could have been, does not appear.— It is very improbable that the circumstances of Sewall were much known at Plattsburgh, at that time. It does not appear, that they were known at all. Hence any in*quiry* by the plaintiff, in the neighborhood, might have been of no use. It is pretty certain, that the plaintiff would not thus have gone to Danville and performed this labor, if he had not believed, he should receive his pay.— All these considerations presented themselves as fully to the defendant then, as they have since been presented to the Court and jury. If the defendant stood by, as was testified, and refused to become holden himself to pay for the plaintiff's labor, and heard Sewall, the bankrupt, make this contract with the plaintiff for his the defendant's benefit, and took the plaintiff home with him and received his labor, the defendant all this time knowing of Sewall's total inability to pay the plaintiff, and yet did not undeceive the plaintiff by informing him of Sewall's bankruptcy, from all this the jury might well infer the fraudulent intent of Sewall and the defendant to obtain this labor of the plaintiff, and he be left with no prospect of any compensation for it.

The verdict was in favor of the plaintiff, and the Judgment of the County Court is affirmed.

Charles Davis, for defendant.
Geo. B. Chandler, for plaintiff.

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CHESTER W. BLOSS *vs.* JOSEPH W. KITTRIDGE.

That the decision of the County Court upon a motion for a new trial cannot be carried up to the Supreme Court by exceptions to such decision.

That, when one of the several pleas in offset is defective in substance, and there is a general verdict for the defendant by reason of damages allowed on such pleas in offset, the judgment must be arrested.

That, in such case, the action is not thrown out of Court, but a *venire de novo* is awarded.

That a count upon a warranty, made after a sale is complete, is bad after a verdict, for want of consideration.

This was an action upon a note, given by the defendant to one John Beckwith, payable to him or order, and by him endorsed to the plaintiff. This note was given for a horse, the defendant purchased of Beckwith. The horse then appeared sound, and was warranted sound; yet he so soon sickened and died, that the defendant undertook to show in his defence, that the disease was upon him at the time of the sale. This defence was presented in several pleas in offset; the first of which was framed upon the written warranty; the two last were general counts; and the second stated the promise as follows. "And the said Joseph W. Kittridge further declares and says, that, on the day and year last aforesaid, at Sutton aforesaid, in consideration, that the said Joseph W. Kittridge had bought of John Beckwith, the payee of said note, set forth in the plaintiff's declaration, a certain other black gelding, for a certain other sum of one hundred dollars, then and there paid to the said John Beckwith, the payee of said note, and before the endorsement of the same to the plaintiff, and before the notice thereof to the said Joseph W. Kittridge, and before the commencement of this suit, then and there promised the said Joseph W. Kittridge, that said last mentioned gelding was sound, yet &c :"

The general issue was pleaded to these pleas in offset, and the whole case was submitted to a jury. They returned a verdict in some measure special. They assessed the damages on said pleas in offset generally at a greater sum than the note and applied the amount of the note in satisfaction of the note, and found for the defendant to recover his costs. After verdict and before judgment, the Plaintiff filed a regular motion in arrest of judgment, relying upon the defects in the second plea in offset. This was overruled by the County Court, and exceptions were taken

to their decision. The Plaintiff also filed a motion for a new trial, grounded upon sundry affidavits of a supposed misbehaviour in the Jury, in that some of the Jurors conversed with other persons, not jurors, upon the merits of the cause, during the recess of the Court, and before their verdict was returned into Court. This motion was overruled by the County Court, and exceptions were taken to this decision; and the whole cause, with these motions and exceptions came up for a hearing this term before the Supreme Court.

Argument for the plaintiff, on the motion in arrest.

Motion in arrest on the ground, that the 2d Count in said declaration in sett-off is bad, and the verdict being general on all the counts, judgment ought to be arrested.

The 2d count in the declaration is bad because it does allege that the warranty was after the sale of the horse.

1st. The *time* of the warranty is material. 5 Dane's Abt. p. 660; Kirby, 91.

A general promise without benefit to the promissor or loss to the promissee is a *nudum pactum*. 1 Dane Abt. 109; 2 Strange, 933.

The declaration must allege that the promise or warranty was made previous to and at the time of the sale.—Saund. Pl. and Ev. 450; 3 Bl. Com. 166; 2 Comyn's Con. 229; 2 Croke 639.

A consideration past or executed is bad unless it is averred that Kittridge had bought the horse at the request of Beckwith. 1 Dane Abt. 123; 2 Chit. 280.

A general verdict where there are several counts in a declaration, one of which is bad, must be set aside and judgment arrested. 2 Dane Abt. 602; 3 D. & E. 659; 1 Doug. 376; 1 Bos. & P. 389; 1 John. R. 505; 1 Cain. R. 348.

Argument in favor of the defendant, on the motion in arrest for insufficiency of the second count in offsett.

1. The count is technically good.—2 Saund. P. & E. 518.

2. If defective it is cured by *verdict*.—1 Swift, 776, 7, 89; 2 Saund. P. & E. 514, 515.

3. Where all the counts in declaration are for the same

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of action, and one of them is good, and others bad, and cause a general verdict, judgement will not be arrested.—*Bayard* vs. *Malcomb*, 2 John. 550; *Roe* vs. *Gratehouse*, Ld. Rayd. 14, 52; *Salk. R.* 663; 3 Baylie's Index, 430, 21, 431, 37.

HUTCHINSON, C. J.—The motion for a new trial, founded on affidavits in the County Court, and brought up from the County Court on exceptions, the affidavits accompanying, has been argued on both sides, neither seeming to suspect but what the subject is fairly before this Court. We are inclined to dispose of this motion, and a similar one in another cause, in the outset.—This motion was addressed to the discretionary power of the County Court. Whether they decided correctly or incorrectly, their decision cannot be reversed by writ of error. We are now sitting as a Court of errors, and can only correct those errors which appear of record. The decision of the County Court may have turned wholly upon the weight of evidence, and we, as a Court of errors, cannot weigh the evidence. That the error must appear of record, and depend upon the weight of evidence, has been frequently, and uniformly, decided by this Court.—When the issue of fact is joined to the County Court, as it may be, by the agreement of parties, the party, who would remove the cause here by exceptions, must procure the County Court to allow a Bill of exceptions in due form, reciting therein, not the evidence, but the facts they find proved, adding their decision upon those facts. If this motion can be brought up at all, it must be in that way. But I do not say that it can be brought up at all. We decide only the question before us.

A party has a right, by statute, to apply for a new trial, either by a motion at the same term, in which judgment is rendered, or by a petition at a future term. And a later statute requires all petitions for new trials, in cases tried before the County Court, to be brought before the Supreme Court. Where there is no trial, but, by some fraud or mistake, judgement is rendered by default, the petition to set aside such judgment may be presented to the same Court where the judgment was rendered. So, by the repeated decisions of this Court, the judgment must be final, before the cause can come up on exceptions. If

there be judgment, that the writ abate, that is a final judgment; for it puts the plaintiff out of Court. But, if a plea in abatement is overruled, the defendant may file his exceptions to that decision, and let them rest, till there is a final judgment in the action. If final judgment is against the defendant, there may be exceptions to other decisions in the course of the trial, and all can be brought up at once. If the final judgment should be in favor of the defendant, that will relieve him from further trouble with regard to his plea in abatement, and the decision upon the same.

We now proceed to notice the motion in arrest of judgment. The question, raised in this case, is presented in rather a new shape; but we must apply those principles, which we deem most clearly applicable to the question.

The defendant's pleas in offset, consisting of demands against Beckwith, the payee of the note, sued, and pleaded against Bloss, the endorser of the note, should have begun and ended as a plea in bar. The utmost effect of these pleas would be to bar the action. There could be no recovery of a balance in favor of the defendant, as there might have been, were the suit brought in the name of Beckwith. The most correct mode of pleading would be, to state the defence according to the operation of law upon such facts as compose the plea or pleas. That, in the present case, would be, that the plaintiff ought to be barred, because, &c. setting up this indebtedness of Beckwith, the payee of the note, to the defendant. If this indebtedness were too small to balance the note, let the plea state, that the plaintiff ought to be barred with regard to so much, a part of his claim, because &c. setting up the same indebtedness of the payee, before notice of the endorsement.

But this is a point not suggested by Counsel, and we lay no stress upon it in our decision. Indeed, the special nature of the verdict renders the pleas effectual to bar the action, and nothing more.

The matter, chiefly relied upon by the plaintiff's counsel, is, that the plaintiff has been defeated by assessment of damages, on these several pleas in offset, to the full amount

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of his note; and that these damages are general, and, for ought, that can now be ascertained, they were assessed equally upon all the counts, or wholly upon the most defective count; and that the second count is too defective to be cured by the verdict. The damages are clearly assessed generally as the plaintiff contends, and the position, he contends for is correct, if one count is as defective as he contends for. The position, taken by the defendant's counsel, that all the counts are for the same cause of action, fails, by its not appearing of record to be the case. Indeed, they contain the usual averments of being for different causes. The Court that tried the cause might have known, perhaps, that all the evidence applied exclusively to one count, which, in fact, is a good count, and, for that reason, might have refused to arrest the judgment. They might have gone further, and certified upon the record, that all the evidence applied exclusively to such a count, describing it, and this court might treat that as a part of the record. But this has not been done; and we have no guide, but the pleadings and the verdict. The question then arises, is the second count of the defendents plea in offset thus defective? For no objection is started against any other count.

The objection to this count is, that the consideration is past. That is, that the promise or warranty of soundness is alleged to be after the sale of the horse. If, this be so, it is a fatal defect; for all the authorities cited, and all, that can be found, agree that a warranty must be made at the time of the sale, making a part of the contract of sale, or it is not binding; because wholly without consideration. It is contended, however, in argument, that the words *then and there* connected with the allegation of the promise, refer to the time and place of the sale of the horse.—The Court are unable to discover that this construction can be correct. At the time when this promise or warranty was made, it was made in consideration, that the defendant *had* bought the horse of Beckwith. Not that he would then buy, but had bought. That is had before that time bought, &c. When carefully examined, the sense is as clear, and in legal effect the same, as if this count had alleged, that, on the first day of January, in consideration,

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that said defendant had, on the 30th day of the preceding December, bought the horse of Beckwith, he Beckwith promised, &c.

Upon this construction, the promise, contained in this second count or plea, is without consideration; and the judgement of the County Court, which overruled this motion in arrest, is reversed; and it now becomes our duty to render such judgement as the County Court ought to have rendered. But we are unable to determine what that is without the intervention of another Jury. Therefore, a new trial is granted. If the defendant should apply for leave to plead anew, the Court can say, on what terms they will permit this to be done.

It will not do to drive the plaintiff out of Court for a default of the defendant in pleading. Nor would it do to render judgement for the plaintiff for the amount of his note, notwithstanding the verdict. For the defendant has made out an entire defence; and it may prove to be a good defence, when presented upon a correct state of pleadings.

The plaintiff's council, here expressed a willingness to have the judgement arrested in toto, and the action go out of Court. This was objected to, as there have been several expensive trials, and the defendant chose to risk recovering his cost. The Court refused to enter such judgments as the defendant's counsel required; as the plaintiff might become nonsuit if he chose.

The plaintiff's counsel then asked for leave to become nonsuit, without being subjected to the costs, which have been occasioned by the trials upon these defective pleadings of the defendant.

The Court permitted the nonsuit with no costs to be taxed against the plaintiff, except what accrued previous to the last term of this Court, when a review was granted by this Court.

J. Mattocks, for plaintiff.

J. Fletcher, for defendant.

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HARVEY MOORE, *vs.* SILAS KELLEY.

That the possession of personal property must be changed, on a sale, to render such sale valid against the creditors of the vendor.

That it is not sufficient, that the vendor has, moved from the premises, where the property is kept, if the same remain under the care of the vendor's servant, and the sale not known even to that servant.

This cause came up from the County Court to be examined upon the following Bill of exceptions, to wit: Trespass for a two year old Steer and a yearling heifer.—Plea not guilty and trial by Jury.

It appeared in evidence, that, in March 1829, one Samuel Moore went into possession of a farm in Barnet, belonging to one Gibson, under a verbal lease for a year, Gibson stocking the farm, and Moore to have part of the increase of said stock, at the end of the term. That, in the fall of 1829, said Moore engaged in a job of lumbering at Northumberland, New Hampshire, and, for the convenience of said business, took his wife and child, and part of his furniture with him to Northumberland; and neither he or his family ever returned to reside on said farm. That, upon so leaving said farm, said Moore agreed with one Whiting to take charge of the stock; and, for that purpose, Whiting moved into the house, which Moor left, and tended, and took charge of, the stock on said farm, till about the last of April 1830. About the first of said April Moore, without his family returned for a temporary purpose, with his teams, which were immediately attached. He came to a settlement and division of the stock with Gibson, and, in his share, received one of the cattle sued for, the other being previously the property of said Moore. He thereupon sold both the cattle in question to the plaintiff, in satisfaction of a sum of money, which the plaintiff had paid for him to a third person. Said Moore claiming to have a small quantity of hay on said farm, it was understood between him and the plaintiff, that the latter might let these cattle remain till the end of foddering time, and be fed upon said hay. They accordingly did remain with the other stock, and were fed by Whiting, till about the 13th day of April 1830, when the defendant attached them as the property of said Samuel Moor, and followed up said attachment by a judgment and sale on execution.

At the time of said sale to the plaintiff, the year, for

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which Samuel Moore took the farm, had expired—and, previous to said attachment, Whiting had applied to Gibson to take said farm, but no agreement was made between them upon the subject till after said attachment.

There was evidence tending to show, that, as part of the contract between Gibson and said Moor, the latter was to tend the stock, and feed out the hay on said farm while foddering continued in said Spring of 1830.

The defendant's counsel requested the Court to charge the jury, that, if they found, that said Moor was, by his contract with Gibson, to tend the stock on said farm, till the end of the following season, and that Whiting continued to tend the stock there till the attachment, in consequence of such obligation on the part of Moor, the sale to the plaintiff should be regarded as fraudulent and void in law, as against the creditors of said Moore, for want of a change of possession.

But the Court refused so to instruct the jury—but charged, that, as the term of said Moore had expired and he had left the farm, although they should find that Whiting continued to tend the stock in consequence of the obligation of Moor to do the same, or cause it to be done, yet that was not such a returning of possession by Moore of the cattle sued for, as would render the sale to the plaintiff fraudulent in point of law—and, of course, the plaintiff would be entitled to recover, if they should find the sale to have been made for a full price paid (explaining such considerations) and not with any design to deceive and defraud the creditors of said Moor.

Verdict and judgement for the plaintiff. To which charge and refusal to charge the defendant excepts.—Exceptions allowed and passed to the Supreme Court.

Argument for the defendant.—The principle is well settled in this state, that a sale of personal property, to be valid as against attaching creditors, must be accompanied by a visible substantial change of possession. *Durkee* vs. *Mahony*, 1 Aiken, 116; *Boardman* vs. *Keeler*, do. 158; *Mott* vs. *McNeil*, do. 162.

In the case of *Barney* vs. *Brown*, 2 Vt. Rep. 374, and *Spalding* vs. *Austin*, 2 Vt. Rep. 555, the Court relaxed

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this rule, so far as to say, that an actual removal of the property is not in all cases necessary, if there is something equivalent thereto.

In those cases there was a substantial change of possession. The Bailee was notified of the sale, and consented to hold the property in trust for the purchaser. This possession, then, became the possession of the purchaser. But not so in the present case. Samuel Moore, by his contract with Gibson, was to retain his possession of the stock, until the end of foddering time. He employed Whiting to take charge of them, for *him*, and in *his* stead. Whiting's possession, then, became the possession of Moore, and Moore's creditors had a right to treat the property as his, until there was a change of possession. There was no such change. Whiting, without notice of the sale, continued to take charge of the stock for, and in pursuance of his contract with Samuel Moore, until they were attached by the defendant. There was no privity between him and the plaintiff.

The possession remained precisely as before the sale. The cattle were fed from the same mow of hay, by the same individual as servant of the vendor.

Had notice of the sale been given to Whiting, and he had consented to hold the property in trust for the plaintiff, this would have presented quite a different case.

In the case of *Barney* vs. *Brown*, the Court say, that it was the duty of the creditor to make inquiry, and ascertain the ownership. But how could that have been done in the present case? No human being knew of the pretended sale, save Samuel Moore and the plaintiff. Moore, of course, would not be consulted, he being interested to secure the property from attachment. There was nothing to induce any one to suspect, that the plaintiff had any thing to do with it. Of whom, then, should the enquiry be made? Most naturally of the individual, in whose possession the property is found. His answer would be, that it was Samuel Moore's, and that he was keeping it for him.

It is difficult to perceive, that the circumstance of Moore's term having expired, for which he took the farm, can affect the case; inasmuch as the term, for which he had contracted to keep the cattle of Gibson, had not yet

expired. Though Whiting was no longer tenant of the farm under Moore, yet he still continued in possession of the stock, in pursuance of his contract with Moore, and as *his* servant and bailee. The present question is therefore altogether independent of the question, whether Whiting still continued in possession of the farm, as Moore's tenant or not? Yet this is made the turning point in the charge of the Court below.

The principle of fraud in law is intended to guard against collision between debtors and third persons, by which the property of the debtor is secured from his creditors, by pretended sales, and to prevent individuals from obtaining a false credit as the owner of goods, which they have secretly transferred.

Upon the principle of the decision below, where is the creditor's security? If he attaches the property of his debtor in the hands of his servant, a third person may claim it by virtue of a secret transfer, known only to himself and the debtor, unaccompanied by any visible demonstrations of a sale. In this way, a person by the kindly aid of a friend may put all his property out of the reach of process, and still ostensibly be the owner of his thousands, and in good credit with his neighbors.

In fact every reason, that can be urged in favor of the general rule of law upon this subject, in cases where the actual possession is in the debtor, may with equal propriety and force, be urged in favor of applying it to cases of this kind.

In fine, we know of no better rule upon this subject, than, that laid down by his honor the chief justice in the case *Mot* vs. *McNeil*, that, to render the sale of personal property complete as to creditors, there must be a change of possession, and this must be a visible substantial change, so that the possession will no longer give a credit to the former owner.

The Council for the Plaintiff, argued, that the case shows a full and complete change of possession. Samuel Moore, the former owner, had not lived on the farm, where these cattle were attached, during the preceding winter. He was there a day or two, at the close of his lease, to settle his affairs, and divide the stock with Gibson, and sold these two creatures to the plaintiff, in payment of a preex-

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isting debt, and then was off again about his other business. He had no more control of the farm, or stock upon it, after the first of April, than any other man. And this attachment was not made by the defendant till the thirteenth of April. The principle of fraud in law has not been extended to cases, where the property was out of the possession of the vendor at the time of the sale. We think the charge of the County Court was correct, and their judgment ought to be affirmed.

HUTCHINSON, C. J. The only question, raised in this case, is, whether the instructions of the County Court to the Jury were correct, upon the subject of the change of possession at the time of the plaintiff's purchase. It seems, that Samuel Moor, the debtor had not taken the personal care of this property for several months previous to the sale. Of one of the creatures he only became the owner at his settlement with Gibson, at the expiration of his lease of the farm. But he was under a contract with Gibson, the owner of the farm, till the season of foddering was over; and, when he went to Northumberland to attend to his lumbering concerns, he left Whiting to take care of the stock in his stead. Whiting moved into the house on the farm; and what he did there, he did as the servant of Samuel Moore, the debtor. And, when he made this sale to the plaintiff, it appears to have been a part of the contract, that plaintiff might suffer the cattle to remain in the care of Whiting on the farm, where they then were, and be fed upon the hay of S. Moore, the vendor.—Thus they continued till April 13th, when they were attached as the property of said Samuel Moore.

The case exhibits nothing, that shows Whiting to be any other than the servant of Samuel Moore, in all this business. There is no intimation, that Whiting was informed of this sale to the plaintiff; nor that any person whatever knew of it, or had reason to suspect it, except the two Moore's, one of whom was the vendor, and the other the purchaser of these cattle. As to any credit which might attach to Samuel Moore from his ownership of those creatures, it was the same now, as if he had tarried upon the farm, and foddered them himself, instead of employing Whiting to do it. We consider the possession not sufficiently changed, to entitle the plaintiff

to hold this property against the creditors of Samuel Moore, his vendor. CALEDONIA, *March*, 1833.

The judgement of the County Court is reversed, and a new trial is granted. Moore vs. Kelley.

G. B. Chandler, for defendant,

I. Fletcher, for plaintiff.

JOSIAH SHED *vs.* SERVY GARFIELD et al. Also, SERVY GARFIELD et als. vs. said JOSIAH SHED. A CROSS BILL. CALEDONIA, *March*, 1833

IN CHANCERY,

That a Bill of foreclosure need not allege, that the mortgagor had any title to the premises mortgaged.

That a demurrer to a bill in Chancery, which is well taken as to some point or points, therein named, but not well taken as to others, must be overruled in toto.

That a bill, which wholly omits the interrogating part, is, for that reason, defective.

That a demurrer to a discovery of usury, charged in a bill, must be allowed, unless the person demurring waives the forfeiture, and seeks only to be relieved against the usurious part.

That the Court will not admit a plea of usury, presented, out of time without a waiver of the forfeiture.

The Orator, Josiah Shed, brought his Bill of foreclosure to the last term of this Court, which was continued for plea, answer, &c. under the general rule of this Court. The respondent filed a demurrer and and plea, after the time had expired. The orator made no objection to receiving the demurrer, but objected to the Courts receiving the plea.

The demurrer assigned two causes. 1st. That the Bill had not alledged that Garfields wife, who had executed the mortgage with her husband, had any interest in the land mortgaged. 2d. That the Bill was defective, by including no interrogatories to the respondents and thereby precluding them from their answer under oath. The citation, served upon the defendants, called upon them to appear and answer to the Bill in the usual form. These defendants also brought their cross Bill to this present term, reciting the substance of the original Bill, and charging, that the note therein described, was usurious: also charging sundry payment, not indorsed upon the note, secured by the

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mortgage; and praying for a discovery upon both points.

Josiah Shed, the defendant in said cross Bill, demurred to that part of it, which sought a discovery of the usury. These both came on to a hearing together, and were concisely argued by the Solicitors.

On the last day of the term, the decree of the Court was pronounced by Hutchinson, Chancellor, as follows. The Court discover no validity in the first cause assigned in the demurrer to the original bill. The allegation, that the defendant signed, sealed, acknowledged and delivered the deed, is sufficient, without averring any title in the grantors. They are estopped, by their deed, from denying their title: and the Orator has a right to a foreclosure against them, whatever may be their title, or claim of title. If they have no title, at the giving of the mortgage deed, the decree may be of no avail to the Orator. But the grantors have no right to object on this account. With regard to the other objection to the original bill, it appears probable, that both parties entertained an incorrect view of the subject. It appears probable, from a view of the allegations of both parties, that the Orator designedly omitted to propose interrogatories, through fear, that the answers of the defendant's would disclose the usury, and the oath of the defendants to such answer would be obligatory upon the mortgagee. This is not so. The Orator might propose such interrogatories as he might wish answered, and, if the answers disclosed usury in the original contract, a traverse of the answers would drive the defendant to their proof; and their oath to such a distinct matter, set up in defence, would not aid in proving the answers. On the other side, too, the defendants were not deprived of their privilege of answering upon oath the matters alleged in the Bill, as they contend in argument. They were summoned to appear and answer to the Bill. Their answer, upon oath, might deny every material allegation of the Bill, and put the Orator to the necessity of proving the whole. Or, they might set up any defence they pleased, by plea or answer. It seems, by the second of Swift, cited in argument, that the practice in Connecticut is frequently to rely upon common law proof in Chancery proceedings, and not call upon the defendants to answer upon oath. This practice is rather sanctioned by

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the reasoning of the Chancellor in the case cited in Cowen, by these defendants. The doctrine there laid down is, that the orator need not appeal to the oath of the respondent, to prove such facts, as he can prove by other testimony; but may so appeal if he chooses.

But there are cases, in which the discovery sought, and the allegation of the want of other testimony to prove the parts, necessary for relief, alone give jurisdiction to a Court of equity. In such cases, an omission of the interrogatories in the Bill must of course be fatal, and we do not feel willing to dispense with them in any case. They make a part of all the forms, that come to us from the English practice; and that practice has prevailed in this state; and is almost confirmed by our statute. If the demurrer had been taken for this defect only, the same must have been allowed. But this demurrer covers other grounds not tenable. The first objection has been already overruled. And a demurrer in Chancery must either stand or fall intire. This demurrer is overruled, and the defendant must answer over.

The cross Bill charges usury in the original contract, and seeks a discovery of this usury, without waiving the penalty, of the statute. If the orators had, in their cross Bill, waived the penalty, and merely sought to avoid the usurious part of the contract, the demurrer must have been allowed. But they have no right to such a discovery, as would render the note void by statute. This demurrer is allowed, and the defendant in the cross Bill must answer only to the remaining parts of it.

A question was now raised, whether the Court would compel the orator in the original Bill to meet the plea, filed after the time for such filing had elapsed. The Court refused to admit the plea, saying they would not aid the defendants to set up a defence, which would defeat the whole note, when they had neglected to plead within the rules. If they would claim the forfeiture of the note, they must present their defence according to their right, and not depend upon gaining any indulgence from the Court. If they are content to avoid the usurious part only, they are entitled to the same favorable considerations, in presenting their defence, which are usual in dispensing with a strict compliance with the rules in other Chancery cases.

Messrs. Bloss and J. Mattocks, for Shed.

Messrs. Burbank and Fletcher, for Garfield et al.

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MATTOCKS *vs.* OWEN.

A person who makes a charge on book and attempts to support it by his own oath, must answer all material questions in relation to that charge or the charge will be unsupported and disallowed.

If a party submits to an examination under the direction of an auditor or referee and testifies, it is no objection to the report that the auditor improperly required him to testify. His testimony may be considered as an admission of a fact by the party.

Where a person is illegally imprisoned, and employs the person who imprisons him to perform a service for the purpose of relieving himself from that imprisonment, the person who performs the service cannot maintain an action to recover a compensation therefor.

Any promise founded upon the consideration of compounding a felony is void.

This was an action depending in the County Court upon an appeal from a Justice of the Peace, and brought on certain notes endorsed by one William B. Eastman to the Plaintiff, amounting to $85,99, to which the defendent plead in offset his account against said Eastman, arising before notice of indorsement containing the following item: Febuary 4th 1829.—"Going to Gilmantown for you, to get your brother to help you out of difficulty, $25. The cause was referred to Benjamin F. Deming, Esq. who reported the following facts in relation to the item aforesaid which was the only matter in controversy.

The defendant having been sworn and examined in relation to the several items of his account, testified that he performed the service, named in said charge, and paid the expenses of said journey—that he was employed by said Eastman to make said journey, and that said Eastman promised to pay him therefor. The plaintiff enquired of the defendant the circumstances preceding and attending said charge and services, and particularly as to the facts hereafter stated. To which enquiry defendant objected, which objection was overruled, and the following facts appeared by the testimony and admissions by the defendant. That sometime previous to the services named in said charge, the defendnant and Doct. Adams of Barton signed a note to the Bank of Caledonia as sureties for said William B. Eastman for $600—that said Eastman afterwards absconded into the State of New York, leaving the defendant and said Adams to pay said Bank Note without any security or indemnity whatever—that by the procurement of the defendant, one of the Grand

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Jurors of the town of Barton made a complaint against said Eastman in writing to James May one of the Justices of the Peace for Orleans County, charging the said Eastman with having some time before feloniously stolen and carried away sundry sheep the property of some person therein named, and charging him with other small thefts —that thereupon said Justice issued his warrant to apprehend said Eastman directed to the Sheriff of said Orleans County his deputy, or either constable of said Barton, which complaint and warrant were in due and usual form of law—that said warrant was delivered to one Fisk who was then and at the time of said charge a legal Deputy, Sheriff for said Orleans County; that the dafendant applied to the States Attorney for said Orleans County by whose advice he made application to the Governor of this State, taking a letter from said States Attorney to said Governor—that his Excellency Samuel C. Crafts, then Governor of Vermont annexed to said warrant his official letter to the Governor of the State of New York, requesting him to cause said Eastman to be apprehended and delivered over to the defendant and said Fisk who went in pursuit of said Eastman, the said Fisk being employed by the defendant. The defendant did not present to said Governor any affidavit in support of the charges contained in said complaint, nor was any affidavit made nor oath taken before any one in support of said complaint previous to the granting said official letter, nor before the arrest of said Eastman—that in pursuance of said letter from the Governor of this State, Lt. Gov. Pitcher, then acting Governor of New York issued a warrant to the Sheriff of Rensselaer County to apprehend said Eastman, and deliver him over to the defendant and said Fisk—that by virtue of said warrrant said Sheriff did at Troy in the State of New York apprehend said Eastman and deliver him to the custody of said defendant and said Fisk, who after putting him in irons, in company transported him to Cambridge in this State, where the defendant left said Eastman in custody of said Fisk and returned to his home in Barton, and from which place said Fisk transported said Eastman to said Fisk's house in Irasburgh—that late in the evening after the arrival of said Eastman at said Irasburgh

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the defendant and said Doct. Adams repaired to said Fisk's house where said Eastman was then held in custody. Said Adams then advised said Eastman to send for his brothers residing in Gilmanton, New Hampshire to help him out of his difficulty and to pay the sum which said Adams and the defendant had been compelled to pay the Bank or were then liable to pay as the sureties of said Eastman; to which said Eastman consented, and a letter was drawn up by said Adams and subscribed by said Eastman, directed to the brothers of said Eastman at said Gilmanton, setting forth the arrest and confinement of said Eastman, and requesting assistance of said brothers for his relief, and soliciting their assistance for the payment or securing of said Bank debt, and for the payment of the time and expenses of the defendant, and said Fisk in said journey to New York for the arrest of said Eastman; which letter was read in the defendant's hearing; and in case said brothers had so secured said claims and demands said Eastman was to be released from said Adams and the defendant, or so far as they were concerned. That under these circumstances said Eastman did request the defendant to take said letter to his brothers at Gilmanton, and promised to pay the defendant for said journey. That the defendant did perform the journey named in said charge which proved unsuccessful, said brothers of said Eastman refusing to interfere—that afterwards said Eastman was carried before Justice May on said complaint and warrant, and on trial by Jury before said Justice was convicted, and appealed to the County Court in which cause the State's Attorney entered a *nolle prosequi* and then filed an information against said Eastman for the same offences, and afterwards entered a *nolle prosequi* as to that information. The Referree disallowed said charge on the facts above stated.

Whereupon the defendant excepted to the report in relation to the item of account disputed, in as much as the referee after due proof of the same compelled the defendent contrary to his consent to disclose the facts detailed in his report, and in drawing his conclusion from those facts that the defendant was not entitled to recover for said item, although the performance of the services therein

named at the request of said Eastman was satisfactorily proved.

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Upon a trial of the exceptions by the County Court they were overruled. The defendant then filed exceptions to this decision which were allowed and the cause carried to the Supreme Court.

Argument for plaintiff.—1st. It is objected that the creditor ought not to have compelled defendant to testify to circumstances relating to the disputed charge. The facts disclosed were material; and clearly a party who offers himself a witness shall have no right to recover upon the truth half told, when a disinterested witness must tell the whole truth.

2d. The charge was properly disallowed, because the arrest by defendant and by his procurement was illegal (Act of Congress Story's Edition, vol. I. p. 284,) there being no indictment nor affidavit of guilt, and all after proceedings while in custody was duress, and the contract void.

3d. The case shews the criminal proceedings were without probable cause, got up by defendant, to torture Eastman until his friends would buy him off by paying up his debts, and the agreement to pay defendant for going to New Hampshire was extorted from Eastman. In short defendant was guilty of fraud, duress, and extortion.—*King* vs. *Southerton*, 6 East. 134; 2 Skarkie, 431.

4th. The consideration of the promise was to compound felony. It is apparent from the case that defendant was to drop the prosecution, if the bank debt was sued. At least, that defendent knew that Eastman so understood it and if so, defendant was bound to do so. And if he intended so to do, it was a fraud upon the public; if he did not intend to discharge Eastman, it was a fraud upon him.

5th. Part of the object of the journey was to solicit pay for bringing Eastman from New York in irons with no legal authority. If he had received the money for this it would be recovered back. This part of the condition being bad, it destroys the whole. 1 Dane, 92.

Argument for defendant.—The leading objection to the report and acceptance thereof, is that a witness is not com-

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pellable to testify to facts *tending* to subject him to criminal prosecution *even* for a fine only. This is well established by all authors on the subject.—Phillips, 205, to 208 and notes.

That the facts disclosed tend to subject Owen to a *fine* and perhaps imprisonment, there can be no doubt.—4 Black. 218. Will it be contended though a common witness is thus protected, a party who voluntarily testifies in his own cause is not? The reason for protection, is the same to avoid indictment; otherwise the statute to testify in his own cause is in a measure defeated. The law as to common witnesses was well known, when the statute admitting the party to testify passed, and as no exception is made, none can be presumed.

A Court of Chancery thus protects a party.—Foublanque, p. 710, 716, 717.

And a party in an action on account in Book, especially on cross examination, stands in the same situation as a defendant in Chancery disclosing for the benefit of the opposite party.

In relation to the legality of the charge it may be observed, that, Owen had ceased to participate in the supposed duresse of Eastman when he left him at Cambridge. When he met him again at Irasburgh, he was in the lawful custody of Fisk, deputy sheriff under the warrant.—Fisk was bound to surrender him up for trial as he afterwards did. Therefore when Eastman made the contract, to pay for the journey, he was not under duresse by *Owen*.

It is well settled Law that if a debtor is arrested by breaking his house, the suit will not abate. E. W. Judd's case in 1800. Trespass will lie for breaking house and perhaps case, but not *trespass* for the arrest.

So of witness arrested while privileged, process does not abate.—5 Dane. 586. *Cameron* vs. *Lightfoot*, 2 Black. 1190, *Fletcher* vs. *Baxter*, 2 Aiken, 231.

The opinion of the Court was delivered by *Williams J.* The question in the case is whether the referee decided correctly in disallowing a charge of twenty-five dollars which the defendant made against Eastman, the payee of the note on which the suit was brought.

In the first place it is very questionable whether the

report should have been set aside if the referee was mistaken in his view of the law in relation to requiring the defendant to disclose the facts on which the decision was made.

There is however no doubt but what the referee decided correctly. Either the whole testimony of the defendant should have been disregarded, in which case the charge was wholly unsupported, or the whole was to be received and the decision to be made on the facts disclosed by him. It appears that the defendant made the charge against Eastman and endeavoured to support it by his own oath—It was optional with him whether to bring forward the account and swear to it himself, or not—he was not compellable to do so, if answering all the material questions in relation to the charge might subject him to a criminal prosecution, but he could not bring forward this charge and support it by testifying to part of the transaction and refuse to answer questions in relation to the other part. In the case of *Dandridge* vs. *Corden*, 3 Car & Payne, 11 a witness was called to prove that a bill had been accepted for a valuable consideration who answered that it was, but declined stating what the consideration was, as it might subject him to a *qui tam* prosecution—Lord Tenterden declared that he would not compel the witness to answer to the question put in relation to the consideration, but if he did not state what the consideration was, it would stand as if there was no consideration at all. In the case of *Dixon* vs. *Vale* et al. 1 Car & Payne, 278, Chief Justice Best laid down this rule, that if a witness being cautioned that he is not obliged to answer a quetions which may criminate him, chooses to answer it; he cannot afterwards object to answer any further questions in relation to that transaction on the ground that it might criminate him but must answer all questions relative thereto.

The same question was also decided by Lord Tenterden in the case of *East* vs. *Chapman* reported in 1 Car & Payne 570 and Moody and Malkin 46.

There is no doubt but what the referee was right in requiring Mr. Owen to relate all the circumstances connected with this charge of twenty five dollars, if he attempted to support the same by his own oath—

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But further it may be remarked that even if the view of the referee, on the question before mentioned had been evidently wrong, it would have furnished no ground for setting aside the report.—If Mr. Owen submitted to the decision of the referee and gave a relation of all the facts connected with the charge, the referee, could do no otherwise than to consider them as true, in making his final decision thereon.—His relation was entitled to credit as an admission of facts by the party in interest, and it certainly was no less entitled to credit because it was made by him unwillingly and on oath.

It only remains to consider whether the referee mistook the law in rejecting that charge on the facts which were before him; and we are very decidedly of opinion that the defendant had no claim for that sum of Mr. Eastman. Mr. Eastman was illegally taken from the State of New-York, and the defendant was guilty of false imprisonment in arresting him there. This illegal detention was continued up to the time that the defendant undertook to go to New-Hampshire to procure his brothers to assist in releasing him from that imprisonment, and one object of that journey was to enable the defendant to obtain pay for his time and expenses in illegally bringing the plaintiff from the State of New-York. As an inducement to Mr. Eastman to employ the defendant to undertake that journey, the defendant stipulated to forbear on his part, any further prosecution of the plaintiff for the fictitious and pretended felony that he had procured to be charged against him. The defendant had neither a moral nor legal right to any compensation for a service thus undertaken either at the suggestion of himself or Dr. Adams, or both for the purpose of procuring the discharge of Eastman from his imprisonment, and for the purpose of paying the defendant for his trouble and expense in the illegal and unjustifiable act of taking Mr. Eastman from the State of New-York, and carrying him to Irasburgh—

Any sum which Mr. Eastman might have paid either to Owen or any one else to procure his discharge from that imprisonment would have added to the damages which he sustained by that illegal detention; and we surely would not permit Mr. Owen to recover a sum of money which the

jury would have been under obligation to regard as damages sustained by Mr. Eastman in an action of false imprisonment brought by him against Mr. Owen.

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The Judgment of the County Court is therefore affirmed.

Mr. J. Mattocks, for plaintiff,
Mr. W. Mattocks, for defendant.

HUNTINGTON *vs.* COBLEIGH *and* MINER *vs.* SAME.

CALEDONIA, *March*, 1833.

Under the statute pased in 1823 directing the mode of attaching real estate it is sufficient for the officer to leave a certified copy of the attachment &c. with the Town Clerk, and direct him to record the substantial part and pay him the fees therefor.

Such attachment, when the substance is not actually recorded is good, and creates a lien against any one who has notice of such attachment from the Town Clerk, and has seen the copy on file.

A variance in the copy left with the Town Clerk from the original in a trifling and unimportant particular, does not destroy the effect of the attachment.

This was an action which was tried by the County Court, and came into this Court upon the following Bill of exceptions.

Ejectment for part of No. 5 in the 5th Range 1st Division in Burke.—Isaac Fiske original proprietor.

Plea General issue, both plaintiff and defendant claim title under Samuel Dallibee.

The plaintiff to support the issue on his part read in evidence to the Jury his writ of attachment against said Dallibee, dated February 1, 1827, and made returnable to Caledonia County Court, at their April Term then next to be holden, and purporting to have been served on the 3d of said February, by attaching the land in question. The plaintiff also gave in evidence a copy of said writ with the officers return thereon, which copy was left in the town Clerk's office in said Burke on the 3d day of February aforesaid by the officer serving said writ. The plaintiff also gave evidence to the Jury, tending to shew that the said officer at the time of leaving said copy in said town Clerk's office requested said town Clerk to record the substance of said writ, with the officers return thereon as the law directs, and the officer then paid said town Clerk twenty

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cents for recording the same. And the said town Clerk filed said copy for record; and had no book seperate from his book to record deeds, wherein to record the substance of said writ and officer's return: and no such book was provided until January 1829. When the book was provided, the said town Clerk recorded the substance of said writ and officer's return therein, said record bearing date February 3, 1827, and was made from this copy of said writ, left in said office, and filed for record as aforesaid. A copy of this record, also a copy of the record of the judgment in favor of the plaintiff, and against the said Dallibee recovered in said action; also the original execution which issued on said judgement, and officers return thereon, showing that the same execution was levied on the lands in question; also copies of the records in the County Court Clerks office in said County, and in the town Clerks office in said Burke, were given in evidence to the Jury on the part of the plaintiff. The defendant objected to all, and every part of the aforesaid evidence; but the Court overruled said objections, and admitted said evidence. The plaintiff also gave in evidence, a copy of a deed of the lands in question, executed by the said Dallibee to the defendant in this action, dated February 13, 1828, duly acknowledged, and recorded before the day of said execution. The defendant also gave in evidence the original deed of which the above is a copy. It also appeared in evidence, that the said Cobleigh when he purchased said lands, and took said deed of the said Dallibee, and for some time before had full knowledge, that said lands had been attached as aforesaid by the plaintiff; and that said action was then pending—the said Cobleigh having seen the copy of said attachment, and filing in the town Clerk's office in said Burke, and having been informed by said town Clerk that said lands were incumbered with said attachment but is the said Cobleigh relying on the promise of the said Dallibee to clear off said incumbrance ventured to purchase, and take said deed. Under the direction of the Court in view of the aforesaid evidence, the Jury returned a Verdict for the plaintiff. The defendant excepts to the admission of said evidence, and the exceptions are allowed by the Court.

The other case of *Miner* vs. *Cobleigh*, it appears was the

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same as the preceeding, with the exception that the copy of the writ left with the town Clerk upon which the same lands were attached and a portion set off on the execution issued upon the judgement thereon rendered was defective in omitting a part of the usual declaration on Book. To wit: "Render to said Miner the sum of dol-
"lars which he, the said Miner says is justly due."

Argument for Plaintiff.—The attachment and levy of the defendant is regular unless defeated for want of a book kept in the town Clerk's office for the purpose of recording the substantial parts of writs of attachment.

If the attachment be good against Dallibee, it is good against the defendant, his grantee to the estate, with all its incumbrances. No act of the debtor (the grantee) and a third person can change or defeat the plaintiffs lien on the land.

The case resolves itself into this question. Did the plaintiff gain a lien by virtue of his attachment of the land?

This question depends upon the construction to be given to the 26 *Sec.* of the Statute of 1797, and the Statute of 1823, in addition thereto. These several Statutes have been substantially complied with. Every thing required by the Statute of '97 has been done. So far as that Statute extends the attachmeut is regular. The cause then rests upon the construction of the Statute of 1828. That Statute is an addition to the Statute of 1797. It is merely directory, not changing or dispersing with any thing required by the former Statute, nor does it say unless the requisitions of the last act be complied with, the attachment shall be void, or that the writ shall abate. It but imposes an additional duty upon town Clerks and Officers serving writs. Upon passing it goes into effect immediately without any special promulgation. Time enters into all human transactions. It required time to promulgate the law, and time for towns to preserve books for such records.

Argument for Defendant.—The objection is to the service, that the officer as appears by his return did not cause the substantial parts of said writ, together with his return thereon endorsed to be recorded in the town Clerk's office

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of the town where the land lies which is required by law. Compd. Stat. of Vt. p. 108. To create a lien it must be express contract, usage of trade, or where there is some legal relation between the parties. 2 Saund. P. & E. 145 p. 637, 1 Edit. 1 B. & A. 582.

And if the lien exists in the present case, it is by the operation of law and the act of the plaintiff without any concurrence or consent on the part of the defendant, or of third persons. Therefore the plaintiff must show that he has performed all acts incumbent on him by law in order to create the lien; and in this view the acts of the Sheriff are his acts, and the service of the writ, in other words creating the lien, is a Statute regulation. Compd. Stat. of Vt. p. 64, 65, 108.

Being such, the question is a matter of strict right. 1 Cowp. 29. 1 Burr 377. 4 Burr 2244. 1 Vt. Rep. *Townsend* vs. *Athens*, p. 285. 2 Peters Conn. Rept. 153.

And if the plaintiff does not comply with the requisitions of the Statute, he should take nothing against the defendant who has; for if the law may be relaxed so far as to lay aside that which the legislature saw fit to make the subject of one full enactment, and treat it as surplusage or nugatory, it is for the Court to assume legislative, rather than judicial power. And if they may dispense with the law in one particular, they may in another—therefore if it is not necessary to comply with the law of 1823, requiring the Officer to cause the substantial parts of the writ together with the return thereon to be recorded—by the same mode of reasoning the law of 1796—Sec. 26 Comp. Stat. of Vt. p. 65, which points out the mode of service prior to 1823, may also be disregarded, and have the praying out of the writ operate to create a lien, or even further, let the reason be total neglect of any judicial proceeding whatever reserving to the creditor, the naked declaration that he intended to pray out a writ, and attach said real estate. The cases are parallel, and what would be the law in the one would be in the other. The lien, if created at all, is by compliance with the Statutes above referred to. Was this done prior to the defendants perfecting his title? No—for at that stage of the proceeding, defendant took by deed

from Samuel Dallibee, duly authenticated and recorded, and acquired thereby a perfect title to the premises—provided plaintiff had not a vested lien prior—and if he had not no subsequent act of his, could operate against the vested right of defendant. To shew that in liens by attachment a strait forward course is to be pursued. See Hall Admr. of *Severance* against *Walbridge*, 2d Aikens Rep. 215, and *Murray*, et al. vs. *Eldridge*, 2 Vt. Rep. 388.

The former was where a lien had been created by attachment, which in the opinion of Court was absolved by a subsequent confession of judgment. The latter was where there was a similar lien which the Court adjudged was lost by the parties agreeing to, and having the trial forthwith. If therefore the doing of these acts which are apparently prejudicial to no one, but seem to be beneficial rather than otherwise to all interested, operate to discharge a lien. We may well ask, shall any thing short of the particularity of the Statute regulations acquire it?

But if the Court should be of opinion that after the deed to defendant, plaintiff might proceed to perfect his lien by causing the substantial parts of the writ &c. to be recorded, another question arises, whether even that be done. Indeed whatever record was made, was from the *copy* lodged at said town Clerk's office by virtue of the act of 1797, and not otherwise. The wording of the act of 1823 is "the officer shall cause the substantial parts of the writ," naming those parts, "together with his return thereon endorsed to be recorded"—and necessarily this being a part of the service it is incumbent on him to set forth that fact in his return.

If he has simply left a copy, has he caused the recording to be done in the contemplation of the law? Can he in truth, if he has done no more, certify that he has? And if he does so make his return is it not false? Most assuredly it is for the law of 1797, required the copy to be left, and the recording is over and above.

As it regards a record from a copy of a writ, the Court in the case of *Stevens* vs. *Brown*, 3 Vt. Rep. 420, decided that the record of a copy of a deed, is no record in contemplation of law,—if so, wherein do the cases differ. In either case when spread upon the record, it is a copy of a

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copy. Nor is it like an execution, for the law of 1823, to which we refer applies exclusively to Mesne Process; whereas the law contemplated by the Court in Orleans County relative to the record of an execution applied solely to executions.

The defendant purchased, knowing that there was no record of said writ, and officers return, in the town Clerk's office of Burke, and gave a full and valuable consideration for the premises; believing that the dealings between the plaintiff and Dallibee, would be adjusted, as it was understood he had both the terms and means of settling with plaintiff's Attorney, so that there could be neither legal nor moral claim upon the defendant in this transaction. But on the other hand the defendant has both these to entitle him to recover.

The opinion of the Court was delivered by *Williams J.* The plaintiff claims title by the levy of an execution in his favor, against one Samuel Dallibee, and the defendants title is a deed from Dallibee dated 13 February, 1828.—The attachment on which the judgment in favor of the plaintiff was rendered on which the execution issued was served prior to the date of the deed. The question is, whether that attachment was served, so as to create any lien on the land in question; and this depends on the construction of the law regulating attachment; more particularly the Statute passed in 1823, in relation to attaching real estate. The doings of the officer in serving the writ of attachment as well as the knowledge that the defendant had of the proceedings, appear from the case as allowed by the Judges who sat at the trial.

Previous to passing the Statute of 1823, nothing more was required of the officer serving a writ of attachment, to create a lien on the estate than to leave a copy of the writ with a description of the land attached with the town Clerk and with the defendant in the writ. There was no taking possession as there is when personal property is attached—leaving the copy with the town Clerk, was the attachment which created the lien, and what gave notice to all of the incumbrance thereby created.

This act is unrepealed, and the same ceremony must still be performed in attaching real estate.

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But from some inconveniences suffered, possibly those suggested in the argument, as that the copy frequently was lost (though it was the duty of the town Clerk to keep it,) the Statute of 1823, was passed. The object of this Statute was more effectually, to give notice of the incumbrance created by the attachment, and more effectually to preserve the evidence of the same. The officer was required to cause to be recorded in the town Clerk's office, in a book to be kept for that purpose, the substantial part of the writ and the officer's return thereon. This Statute was directory to the officer; prescribed no consequences as attaching to his neglect in this particular, and without his doing it, so far the parties are concerned, the service would be good to hold them to appear; and to give jurisdiction to the Court over them.

It is obvious that the officer cannot control the town Clerk; he has neither the physical nor the legal power to compel him to procure a book to be kept for the purpose, nor to record what is requisite, at any time that he may wish. The Clerk might be engaged, and it might be several days before he would be able in the regular course of his business to make the necessary record. It is therefore sufficient for the officer to do as he did in this case; leave a true and attested copy with the town Clerk, and direct him to record the substantial part of the writ as pointed out by the Statute, and pay him his fee therefore. As the original is not to be recorded, but only the substance of the same, and as the copy is to be authenticated by the certificate of the officer, the Clerk may safely record what is necessary to be done from that copy, and it would be liable to none of the objections which are raised against recording from a copy unauthenticated by the certificate of any one who is authorised to certify the same.

It may then be enquired what is to be the effect, if the town Clerk neglects his duty in this particular. Since the Statute of 1823, the record of these attachments are to be made in a book kept for the purpose. To this book persons are to resort, who wish to obtain information whether any land has been attached, and if a creditor or person desireous of purchasing finds no such record on enquiry, he may safely attach or purchase, unless he has other notice

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that an attachment has been made. Under the former law he was compelled to take notice of an attachment when a copy had been left. But under this Statute he has no constructive notice, unless the substance is recorded—but he may still be affected by actual notice of an attachment.

Inasmuch, however, as the attachment is valid when the officer has left the copy and given the necessary direction, although the substance is not recorded—as between the parties to the suit, and as the object of the latter Statute is solely for notice and to perpetuate the evidence thereof, a purchaser or attaching creditor who has actual notice of any such prior attachment, must be postponed and take the estate on the lien subject to the first attachment.

Having this view of the nature of an attachment, and the service thereof, and the object of the Statute; as it is found that the defendant had notice of the attachment of the plaintiff, being informed thereof by the town Clerk, and having seen the copy of the attachment and the filing thereof in the town Clerk's office, previous to taking his deed, and as there is no other objection to the attachment or service thereof, the title of the defendant is subsequent to that of the plaintiff, and the plaintiff must recover.

In the case of *Miner* vs. the *same* defendant, the title on both sides is similar to the one which we have been considering, except there is a trifling omission in the copy left with the town Clerk on comparing it with the original.

With respect to this, the general rule is, that if the copy is so wholly defective that the original, if like it, would be altogether void, and could not be made good by amendment—it is no notice of a regular attachment. Those who are to be effected by it may consider the original as similar to the copy, and need not enquire any further, but may treat it as void. This was decided in the case of *Herring* vs. *Harmon* in Orleans County March Term 1832. In the present case the variance was trifling and immaterial, and the original writ, if like the copy, would not have been liable to any serious objection. A lien was therefore created in favor of this plaintiff also by the attachment and the result will be the same in both cases.

The judgment of the County Court in both cases must be affirmed.—Judge Royce dissenting—

Messrs. Fletcher & Mattocks, for Plaintiff.

Messrs. Cahoon & Paddock, for Defendant.

JAMES SCOTT vs. RUSSELL STEWART.

FRANKLIN, *January*, 1833.

That any County Court has jurisdiction over a motion or petition to set aside a judgement, rendered by default before such Court, notwithstanding the late statute, carrying petitions for *new trials* to the Supreme Court.

This was a petition to set aside a judgment obtained by default, through some mistake, as the petitioner contends, and to lay the cause open for a trial. The judgment was rendered in the County Court, and this petition was presented to the same Court, at a subsequent term, with a regular citation to, and service upon, the opposite party. The petitionee filed a motion to dismiss the petition on the ground, that the County Court has no jurisdiction of such a petition; but that the Supreme Court has exclusive jurisdiction, by virtue of the 17th Sec. of the Statute of 1825. The County Court overruled this motion to dismiss, and proceeded to examine the merits, and did set aside the judgment and open the cause for a new trial.—The petitionee filed his exception to this decision, upon which the cause came to this Court for a rehearing upon that question of jurisdiction.

The Counsel for the petitionee have now contended before this Court,

1st. That County Courts have not original jurisdiction of petitions for a new trial; it being given exclusively to the Supreme Court by a statute of 1825, page 6, sec. 17.

2d. The facts set forth in the petition do not disclose sufficient reasons for granting a new trial. *County of Essex* vs. *Berry*, 2 Vt. Rep. 161. The Court in that case adopted the language of Gross, J., *Marriott* vs. *Hampton*, 7 D. & E. 265 and say, "*It would tend to encourage the greatest negligence, if we were to open the door to parties, to try their causes again, because they were not properly prepared the first time.*" And in *Bateman* vs. *Willoe*, 1 Sch. & Lef. Lord Redesdale said "A bill for a new trial was watched by equity with extreme jealousy; and it must see that injustice has been done, *not merely through the inattention of parties.*"

Argument for petitioner.—The only question in this case is, had the County Court jurisdiction? And the defendant, to take away the jurisdiction of the County Court, relies

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on the 17th section of the act of 1825; where it is enacted "That all petitions for new trials, in causes tried before any County Court, shall be presented to, and determined by, the Supreme Court in the same County, where such cause shall have been tried."

This act was not intended to abridge generally the common law right of the County Courts, confirmed by statute, to grant new trials; but to extend the jurisdiction of the Supreme Court to causes tried in the County Court; leaving the general jurisdiction of the County Court to set aside their judgements, rendered through inadvertence, or when there was a want of proper notice, unimpaired. 2 Sellon 357, Compiled Stat. 88, 3 Black. Com. 387, 1 Sellon 482, 374.

The petition is not for relief from a judgement in a cause *tried* in the County Court; but from a judgement rendered on default, through mistake and surprise. Trial is the very thing sought for by the petitioner. His case is not therefore, on any construction, within the letter or spirit of the act of 1825.

HUTCHINSON, C. J.—We might dispose of this question by merely observing, that the County Court granted the prayer of the petitioner, and the original action is now pending before the County Court, and ought not to have been brought before this Court, till wholly disposed of there; when all the exceptions, taken to the decisions of the County Court, might come up together. But we are disposed to decide the question of jurisdiction, which has been presented and argued.

There is a material difference between trials and defaults; and there are appropriate terms, known in law, applicable to each. A motion or petition for a new trial technically appertains to a case, that has been tried by the jury, or at least a trial of the facts. Perhaps the issue being joined to, and tried by the Court, under our statute, would be as if tried by the jury, in this respect. A motion or petition to set aside a judgement, or set aside a default is applicable to the many cases, that happen, through fraud, accident, or mistake.

Before the Statute of 1825, a statute provided for the

granting of new trials by the same Court, that rendered judgement, either on motion the same term, or on petition at a subsequent term. Those provisions were applied indiscriminately to judgements rendered on trial, or by default.

In 1825, when all jury trials and issues of fact were in future confined to the County Courts, the Statute cited, made provision, that the party wishing for a *new trial* should not be confined to a hearing before that Court, which had once decided against him; but might and must call the opposite party before a different tribunal.—The wording of the 17th section cited, shows this. All petitions for *new trials* in causes *tried* before any County Court, shall be presented to the Supreme Court &c., in the same County where such action shall have been *tried*. The language of this statute and the occasion of its passing, show it to be not intended for those cases, where judgement may have been rendered by a County Court by default, said Court then knowing nothing about those facts, which are afterwards urged as a reason for setting aside the judgement.

Cases have been carried before the Supreme Court like this, and heard upon the merits, and the judgements set aside, and the causes sent to the County Court for a trial upon the merits, and the attention of this Court never called to this question of jurisdiction. But we are now fully satisfied, that the jurisdiction of such petitions belongs to the County Courts, and their judgment upon this motion to dismiss, is affirmed.

H. E. Hubbell, for petitionee.

Shelden, Smalley & Adams, for petitioner.

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DANIEL FOSTER *vs.* ELI N. JOHNSON.

That, where five sureties of an insolvent principal confess a joint judgment, and execution issues, and four are committed to prison, and give separate bonds to the keeper of the jail, and then procure the property of the fifth to be sold to satisfy the original execution. He has his action against each one to recover a fifth part of the amount paid.

That in the above case one of the four, thus committed and liberated on bonds, is a competent witness for the plaintiff against another, who is defendant.

That the plaintiff need not give notice and make demand before the commencement of his action, when the defendant caused the measures, which compelled the plaintiff to pay the money, which he now seeks to recover back.

This was an action of assumpsit, which comes up from the County Court by a bill of exceptions, too prolix to be published. The plaintiff obtained a verdict, and the defendant excepted to the decisions and charge. The facts, in substance, were these. The plaintiff and defendant and three others signed a note, as sureties for one Isaac N. Foster, to the Bank, at St. Albans, for $250. Said Isaac N. soon became wholly insolvent, and the debt rested on his sureties only. They confessed a joint judgement for the amount, and execution issued. The defendant and the other three were committed to prison, and gave separate bonds to the jailor; and then procured the Execution to be levied upon the personal property of the plaintiff; and the same was sold at auction to satisfy the execution and the Sheriff's fees for the levy. The plaintiff brought this action against the defendant to recover, and did recover, one fifth part of the amount, including said levying fees. It further appears, that the prison bonds were retained by the counsel for the Bank, for no other purpose but as security for the commitment fees, therein charged. On the trial, Samuel H. Barlow, who had given one of those prison bonds, was produced as a witness for the plaintiff, and was objected to on the ground of interest, but was admitted.

There was no proof of any particular notice from the plaintiff to the defendant, or special demand by the plaintiff, before the commencement of the action.

The defendant contended, and requested the Court to charge, that, without proof of a more direct notice to the defendant, or a demand made upon him for contribution,

he action was not supported; and also, that the plaintiff was not entitled to recover for any part of the officers fees on said execution. But the Court refused so to charge, and instructed the jury, that if they found from the evidence, the foregoing facts, (reciting them) they would find for the plaintiff to recover an aliquot portion, according to the number of sureties, that is one fifth part of the whole sum paid by the plaintiff, including said fees paid by him.

Argument for the defendant.—1st. When there are more than two sureties, an action at law cannot be sustained by one surety, who has paid a part of the whole of the debt against his co-surety, to compel a contribution. In such a case the only remedy is in Chancery. *Collins* vs. *Prosser*, 16 C. L. R. 146.

2nd. At all events this action cannot be sustained without proof of notice to the defendant of payment by the plaintiff to the creditor, and a demand upon the defendant for a contribution.

Common report is not sufficient notice to the defendant. Saund. P. & E. 2 vol. 160; 2 Saund. R. 62 a.

3rd. As the defendant was alone liable to the creditor for the committing fees in the execution against him, the instruction of the Court to the jury, that the plaintiff was entitled to recover of the defendant one fifth of the officers fees paid by him, was incorrect.

Argument for the plaintiff.—1st. It is contended, that the verdict in this case has placed beyond doubt the facts, that Isaac N. Foster is insolvent, that the note in question was executed for the sole benefit of Isaac N. Foster and that the other signers were co-sureties with the plaintiff.

2nd. It is difficult to see in what way Barlows interest would be affected in this suit. He would be neither a gainer or loser by the event. All the plaintiff claimed of the defendant was one fifth part of the amount of the note, and one fifth of the officers fees on the execution. The defendant, Johnson, could not call on Barlow for any part of this sum, if they were co-sureties. Hence Barlow must pay one fifth part, and Johnson one fifth; and in this case,

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if Barlows interest was to be questioned, he was swearing against it; therefore there can be no objection to Barlow as a witness, if called by the plaintiff. *Leavenworth* vs. *Pope*, 6 Pick. R. 419; 1 Strange, 35, *Lockart* vs. *Graham*.

3rd. It is contended, that it was not necessary that Foster should notify Johnson of the payment of the money.—Foster and Johnson were co-sureties on the note. Johnson was bound to pay one fifth part of the note. This was his debt. The plaintiff's paying the whole sum, did not create the debt; but the fifth part, that the plaintiff did pay had become the debt of Johnson, and, upon the payment of the money by the plaintiff, the law raised an assumpsit in the defendant to the plaintiff, as having been paid by the latter for his the defendants use, and at his implied request. The doctrine as established in the books is, that a legal obligation is sufficient ground of an implied promise. Wherever there is a promise, then most clearly it is not necessary to alledge, and prove notice. Laws Plead 365; 17 Mass. Rep. 464, *Bachelder* vs. *Fisk*; 1 East. Rep. 217, *Birkly* vs. *Presgrove*; Cowper Rep. 290.

4th. If the defendants promise be made to depend on the performance of any particular act to be performed by the plaintiff to a third person, it is not necessary to aver, or prove, notice to the defendant of the performance of such act, for he is bound to take notice of it at his peril. Laws Plead. 178; do. 180 & 1.

5th. This was a compulsory payment; and when the plaintiff in consequence of the default of the defendant, has been compelled to pay money which the defendant ought to have paid, the defendant's consent is implied, and consequently no notice is necessary. Stark. Ev. 102, Exallv. Partridge, 8, T. R. 309.

6th. Where it is necessary, that notice should be proved it is necessary, that it should be alledged. But the authorities are clear, that, indebitatus assumpsit will lie for contribution. No notice is ever alledged in indebitatus assumpsit, it is not necessary to prove notice. Swifts Dig. 698, Com. Dig. Pleading C. 74; 17 Mass. Rep. 464.

7th. The case shows, that the defendant had notice of

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the payment of the money. The defendant contends, that there must be proof of a personal demand. That was not necessary. All the law required was, that Foster should not make Johnson his debtor without his knowledge and consent. In this case, Johnson not only had knowledge of the payment after the money was paid, but he ordered the officer to seize, post, and sell, the property of the plaintiff, on the execution. This alone must certainly have been sufficient notice to the defendant. 16 Mass. Rep. 5, *Cooper* vs. *Mowry*, 16 Do. 161.

8th. It is contended, that the plaintiff can recover one fifth part of the officers fees on the execution of the defendant, being the reasonable expenses incurred, and much more so when he has been compelled to pay this sum by the act of the defendant. 17 Mass. Rep. 169, *Hayden* vs. *Cobot*; 2 Stark. Ev. 100.

HUTCHINSON, C. J. The Bill of exceptions, in this case, presents, among other things, the ordinary case of a surety paying money for an insolvent principal, and calling upon a co-surety to contribute his proportion of the money paid. But the defendant's counsel contend, that, there being more than two sureties, one has no remedy at law against another. but must resort to chancery. The case cited from the 16th of Com. law reports, to support this proposition, yields it no support. That was the case of a several bond, and not joint, nor joint and several. And the point decided was, that the breaking off the seal of one obligor, did not discharge the others.

The reason why one of three or more partners must seek an accounting in Chancery, does not exist here. In that case, nothing can be more uncertain than the sum to which each is entitled, until the accounts are adjusted.— Here the sum is as easily ascertained as in any common action of assumpsit. Indeed, it is a mere matter of computation. We have no doubt but that the action is well sustained by the facts stated in the exceptions. But an objection is raised to the competency of the witness by whom these facts were proved. The witness, Barlow, was one of the co-sureties who had given his separate bond to the jailor. We are unable to discover how his interest is

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affected by any decision of this cause in favor of either party. The witness is liable for his fifth part, at all events.—And the defendant is liable for nothing more than his fifth part. The verdict is for nothing more, excepting what is to be noticed about the officers fees. If the plaintiff's recovering would relieve the witness from any portion of the liability, that would create an interest; but the counsel have pointed out no way, in which any such effect would be produced. Another point relates to the plaintiff's having recovered one fifth part of the Sheriff's fees which the plaintiff in part paid, by sale of his property on execution. It is said the other debtors are liable for the fees of their commitment, and ought not to share the expense of the sale of the plaintiff's property. That part of the fees sometimes termed dollarage, or a percentage upon the amount of the execution, forms a joint debt against all the debtors; and probably, the officers would not be entitled to charge this twice on the same execution. But as the debt is not paid by a commitment, the key fees of the jailor cannot be a proper charge against those not committed, unless immediate payment followed, which prevented further pursuit of those who were not committed. The fees paid by the plaintiff in this case, one fifth of which is included in the verdict, discharged all the debtors in the execution from liability to have the same cost ever arise against them on the same execution. It is fair to consider this payment of fees, like the payment of the judgement described in the execution, as made for the benefit of the whole. More especially is it fair in this case, as the other debtors, after suffering themselves to be committed, procured this proceeding against the plaintiff on the same execution, as a mode of relief to themselves.

The objection, which remains to be considered relates to the want of notice. And the case shows, that the plaintiff produced no evidence of his having called upon the defendant, and told him of this payment of the execution, and demanded a contribution. But he did produce evidence, that the four who were committed, were united in procuring this payment from the plaintiff by compulsory measures. It would be little less than mockery for the plaintiff to have gone to the defendant, and given him no-

tice of what he had himself been doing. Notice never need be given, or proved, of that which is equally in the knowledge of of both parties.

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The judgment of the County Court is affirmed.

Smalley & Adams, for the defendant.

Brown & Sheldon, for the plaintiff.

BENJAMIN HATHAWAY VS. EZEKIEL O. GOODRICH.

FRANKLIN, *January*, 1833.

The distinction between the return of a Sheriff on a writ, which he serves; and the return of a collector of taxes on his rate-bill or warrant: The return of the Sheriff is an official act, done under the oath of his office, and deserves credit; but the return of the collector is not an official act, inasmuch as the law does not require him to make a return on his rate-bill, or warrant.

The collector of taxes, who is sued as a trespasser for making distress, may plead specially, and give in evidence his rate-bill, and warrant, and advertisement of the distress for sale; and what these do not prove he may show by parol evidence.

But the Collector's certificates showing the seizure, and sale of the distress for taxes, are not *legal evidence for the Collector.*

This was an action of trespass for taking, and carrying away a *Desk*. Plea the general Issue with notice, as by the declaration and pleadings referred to. The issue being joined, was put to the Court for trial by agreement.

It was admitted that the plaintiff owned the Desk in question; and that the defendant took the same as charged in the declaration. It was also admitted that at the time of said taking, and for several years previous thereto, the defendant was, and had been constable of and collector of taxes in and for the town of Swanton.

The defendant, then gave in evidence sundry tax warrants to him directed, for the collection of State taxes, and other taxes against the inhabitants of said town for several years previous to the year 1827, accompanied with rate bills, and assessments, by which it appeared, that the plaintiff, being an inhabitant of said town, was assessed for several years, and certain sums affixed to his name in the rate bills aforesaid. The defendant proved that in the year 1825, or the beginning of 1826, the plaintiff left the State, and continued absent until some time after the taking of the desk aforesaid. The defendant then offered in evidence a *certificate* signed by him of the *seizure* of said

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desk upon sundry taxes, or tax warrants, against the plaintiff, dated April 16, 1827; also another *certificate* signed by him of the sale of said desk at public auction to *James Platt*, he being the highest bidder, for $12,50, at *Swanton* on the 12th May, 1827; also the advertisement of the desk for sale signed by him, and dated 20th April, 1827, all which are referred to, as part of the case. To these papers the plaintiff made several objections, whereupon, the defendant offered to accompany the same with parol testimony, and thereby to prove the seizure of said desk on the 16th, the advertisement of it on the 20th of April, and the sale of it on the 12th May, 1827, for the sum of $16,02, upon the warrants aforesaid, and to satisfy taxes against the plaintiff, to that amount. This evidence being objected to, the Court excluded the same, with the certificates and advertisement aforesaid.

And no further evidence being offered the Court gave judgement for the plaintiff. And to the several decisions aforesaid, the defendant excepts—exceptions are allowed, and execution is staid, and the case ordered to the Supreme Court.

The opinion of the Court was delivered by

BAYLIES, J.—In the case of *Gyfford vs. Woodgate*, 11 East. 299, Ld. Ellenborough says "faith is to be given to the *official act* of a public officer like the Sheriff, even where third persons are concerned." The law makes the Sheriff a certifying officer of his own doings upon precepts, which are put into his hands for service; therefore his return, as Sheriff, is conclusive evidence against himself, and it is *prima facie* evidence of the facts certified against third persons. 2 Phil. Ev. 226; 9 John. R. 96.

But where an officer is not required by law to certify his doings, and he makes a certificate, what credit is to be given it? This question *seems* to be answered by the decision of the Supreme Court, in the case of *Davis* vs. *Clements*, 2 N. H. 390. In that case, the plaintiff brought *action of trespass* against defendant for taking plaintiff's steers. Defendant pleaded in bar, he was surveyor of highways, and took the steers as a distress for non payment of highway taxes. Plaintiff replied, that the defen-

dant of his own wrong &c. took the steers, with a conclusion to the country, and issue was joined. On trial by jury, it appeared in evidence, that the defendant was duly chosen surveyor of highways in Alton for the year 1816 and had in his hands for collection highway taxes against the plaintiff, and a warrant to collect the same; and to prove his proceedings in distraining the steers to be regular, he gave in evidence *his certified return of his doings indorsed on said warrant.*

Richardson, J. C. in giving the opinion of the Court, says, "the other question to be settled in this case is, whether the surveyor's return of his doings upon the warrant, was competent evidence to be offered by him to the jury to prove the facts stated in the return; and we are clearly of opinion, that it was not competent evidence.—His warrant was not returnable process; the statute has made it the duty of surveyors of highways to settle accounts and pay over any balance in their hands to the select men or town treasurer, but has not made it the duty of the surveyor to make any return of his doings upon his warrant. Where the law has made it the duty of a public officer to make a return of his doings, and has made him responsible for the truth of his return, a return may be evidence; but this is not the case. The return of the surveyor in this case is no better evidence for him, than his own confessions, and declarations would be, and was clearly incompetent evidence to be offered by him to the jury."

There is a plain distinction between the return of a Sheriff, made on a returnable process, where the law requires him to certify his doings, under his official signature, and the return of a surveyor of highways made on his warrant to collect highway taxes, which is not a returnable process, and by law the surveyor is not required to indorse, and certify his doings thereon: The return of the Sheriff is an *official* act, done under the oath of his office, and is deserving of credit; but the return of the surveyor is not an official act, and was not done under the oath of his office; therefore his return is not to be credited like the sheriff's.

If we examine the act (Slade's Ed. 400,) entitled "An

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act regulating the collection and payment of rates," we shall find, that by the third section, the collector of state taxes, in any town, is to receive a warrant from the Treasuser of the State, commanding him to levy and collect the tax, and pay the same into the treasury, by the time prescribed by the act granting the same. The collector is also to receive an Assessment, or rate bill of the tax to be collected from the selectmen of the town.

Then the collector shall immediately give, at least six days notice, to each *inhabitant* or *resident* of such town, who is taxed in such assessment or rate bill, the sum at which he is assessed, and of the time, and place he will attend to receive such rate or tax, before he shall make any distress thereof.

And upon the neglect, or refusal of any person to pay his rate or tax, the collector is empowered, and required to distrain the goods and chattels of such person.

Then by the 4th section, the collector shall keep such distress four days, and if the rate or tax, with costs and charges, be not paid in that time, the distress shall be posted for sale, for the space of six days, in some public place within the town, and then shall be sold at public vendue to the highest bidder.

By the 9th section, the collector may collect a tax, in his rate bill, in another town, as well as in his own; and shall, and may levy and collect a rate, or tax, or such part thereof as shall be due, at any time after the expiration of his year, as well as before.

By the 12th section of the act, when any town shall grant a tax, as empowered by law, it shall be the duty of the selectmen to make out a rate bill of said tax, apportioned to the several persons of whom the same is to be collected, as the law directs, and apply to some justice of the peace of the same county, for a warrant to collect said tax, who is hereby required, and empowered to issue such warrant, to the collector of taxes for such town. And such collector, on receipt of such rate bill, and warrant, shall have the same power, in all things, in collecting such tax, as is before in this act given to constables, in the collection of state taxes.

It does not appear, that the collector of state, or town taxes, is required to make return of his doings on the rate bill, or warrant in his hands, by virtue of which he made the distress; nor does it appear that such rate bill, or warrant is a returnable process. I conclude, that the collector in making his defence in this suit, has a right to give in evidence to the jury the original rate bills and warrants in his hands, to show his authority to distrain the plaintiffs desk to satisfy the taxes which the plaintiff owed. So if the defendant had in his possession the original advertisement of the desk for sale, he might give this in evidence, it being an official paper; but if he had not the advertisement in his possession, he might give parol evidence of its contents, and of its being posted as the law required. 8 Mass. Rep. 111. Whatever facts in defence, the defendant failed to prove by said rate bills, warrants and advertisement, he might prove by parol evidence: he might prove by parol, that the plaintiff was not an *inhabitant*, or *resident*, of the town, as an excuse for the defendant's, not giving the plaintiff notice of the taxes before the distress was made; also might prove by parol that in every respect, the Defendant complied with the law in taking, keeping, posting and selling said distress. But I apprehend, that the Defendant's certificates, by him signed, showing the seizure, and sale of the Desk, were not legal evidence in the cause; because the law had not made the Defendant a certifying officer of these facts; and the Defendant is not to make evidence for himself by certificates, which are not official. But as the Defendant offered parol evidence, as well as the certificates, and the Court excluded the whole, the judgment of the County Court is reversed and a new trial granted.

Hunt & Beardsley for plaintiff.

Brown & partner for defendant.

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RACHEL MACKS *vs.* JOSIAH BRUSH, JR.

It is not a question of law; but matter of fact for the auditor to find, whether 50 cents per week agreed upon between A. and B. as the wages of A. for eleven weeks work, was by agreement, or understanding of the parties, to be the price of other labor done by A. for B. eight months afterwards.

This Court will always presume the auditor did his duty, unless the contrary appear.

The act relating to actions of account has been construed to require the auditor to state in his report, what items of account he allowed, and what items he disallowed; but he need not state the ground, or reason of allowing, or disallowing any item, unless specially requested.

If the auditor be requested to report the ground, or reason of his allowing, or disallowing an item of account, and he refuse to do it, this may be set forth in exceptions to his report, and proved by affidavits: All which would tend to show partiality, unfairness, or corruption in the auditor, and deserve the consideration of the Court.

This was an action on Book Account, and judgement to account was rendered, and an Auditor was appointed, who reported generally that the plaintiff recover the sum of $3,38 cents to balance book accounts—and also reported specially concerning the case. Defendant filed exceptions to the report, which was accepted, and judgement rendered thereon by the County Court; to which judgement the defendant excepted, and the case is brought to this Court for a further hearing, and correction of errors, if any there be.

BAYLIES, J. pronounced the opinion of the Court. I shall notice so much of the special report of the auditor, as will raise the points which were litigated by the parties before this Court. The auditor reported, "That as to the first item in the plaintiff's account for 91 weeks work, commencing 15th July and ending first of October 1826, charged at 75 cents a week, $8, 25, it appeared in evidence, and was proved to the auditor, that previous to the 15th July 1826, the plaintiff agreed with the defendant to labor for him at the price of fifty cents per week, $5,50. "As to the second item charged in the plaintiff's account; viz. "To labor at 83 cents per week commencing June 5, 1827, and ending last of March, 1828, $35,87.

The auditor finds that the defendant agreed with the plaintiff to labor for him, but made no contract with the plaintiff as to the price or time of service." "The de-

fendant contended that the contract made before the first work was done would operate to fix the price for the labor charged in the second item of the plaintiff's account; but the auditor decided that the contract for 50 cents per week related only to the eleven weeks of work, and that the plaintiff was entitled to recover what the labor charged in the second item of the account was reasonably worth, and allowed the plaintiff for 42 weeks at 83 cents per week, making $34,86."

The auditor after stating what items he allowed, says "All the other items in the defendants account are disallowed."

The defendant assigns his reasons in writing for excepting to the above as follows: The auditor finds but one contract respecting the price of the plaintiff's labor was ever made between the plaintiff and defendant, and that was previous to the commencement of the plaintiff's services in 1826. The defendant insists inasmuch as the auditor found that no subsequent contract was made between the parties, he ought to have decided, that the services rendered by the plaintiff subsequent to the above period, as it respects the price, were to be governed by the first contract; but the auditor decided that the plaintiff was entitled to receive what the services were reasonably worth. For the above, and other reasons appearing on the face of the report, the defendant excepts."

Should the price of 50 cents per week, agreed on for eleven weeks work performed between the 15th July, and 1st of October 1826, be the price for work performed between June 5, 1827, and last of March, 1828? Here were eight months after the first work was done, before the last was begun. I know of no principle of law, which required the auditor to say, the 50 cents per week, agreed on for the eleven weeks work, should be the plaintiff's wages per week for his last services. If there was any agreement, or understanding of the parties to that effect, it was a matter of fact for the auditor to find; but by his finding, he negates every idea of such agreement or understanding: He says expressly, the contract for 50 cents per week *related only to the eleven weeks work.*" Now the Court would not say that the auditor has found this fact, where it did

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not exist; especially where there is nothing in the report, which tends to lead the Court to such a conclusion.

The defendant also insists that the auditor erred in reporting "All the other items in the defendant's account are disallowed," without stating upon what grounds he disallowed them.

This Court will always presume that the auditor did his duty, unless the contrary appear upon the face of the report, or in some other way. The Act relating to actions of account says "where the auditor or auditors shall have adjusted the account, or accounts, and returned the same into court; judgment shall thereupon be rendered" &c. This act has been construed by our courts to require the auditor, to state particularly what items he allowed; but no decision has gone so far as to require the auditor to state the *ground*, or *reason* for allowing, or disallowing any item of charge. In this case the auditor complied with the act; that is, he reported what particular items of defendants account be allowed and disallowed. If the defendant wished the auditor to state the ground or reason for allowing or disallowing any particular item of charge, the defendant *might request* the auditor to report the *ground*, or *reason* for such allowance, or disallowance; and if the auditor *refused* or *neglected* to do it, the defendant might set forth such *request*, and *refusal* in his exceptions to the report, and prove the same by affidavits. If there had been snch *request* and *refusal* in this case, it would tend to show partiality, uufairness, or corruption in the auditor, and deserve the consideration of the County Court, to decide, whether his report ought not to be set aside. But the auditor was never requested to report the *ground*, or *reason* for disallowing any item of the defendant's account; therefore no partiality, unfairness, or corruption can be laid to his charge. Judgement of the County Court is affirmed.

Aldis & Davis, for plaintiff,
Hunt & Beardsley, for defendant.

HIGGINS & BOGUE, vs. ALEXANDER HAYWARD, JR. (In Error.) FRANKLIN, *January*, 1833.

That the omission of *vi et armis* in an action of trespass, does not vitiate in this state, unless met by a special demurrer.

That the refusal of the Court to receive a plea, after the last continuance, or the taxing of witnesses travel and attendance, cannot be assigned for error, unless the grounds of decision are placed upon the record by a bill of exceptions.

HUTCHINSON C. J.

This is a writ of error, bringing up the record of an action, commenced by said Hayward against the plaintiffs in error, and originally commenced before a Justice of the Peace, and appealed to the County Court. We should suppose, from the papers now presented to us, that there was much warm litigation in the County Court, which ended in the plaintiffs recovering a judgement. To reverse that judgement this writ of error is brought. In *nullo est erratum* is pleaded. The arguments of counsel are too prolix to be published. The first error, insisted upon is a defect in the declaration. The action was trespass for taking a Chaise and harness: and the defect complained of as error is, the omission of the word *force*, in the usual expression, *with force and arms*. There exists, in this State, neither of the reasons, which ever existed in England for making this averment in a civil action when first introduced in England. The civil action was also a criminal process; and, if the plaintiff recovered damages, a fine was assessed to the King. Hence the *vi et armis* and *contra pacem* were apt expressions, in reference to one part of the judgement, that must be rendered in the action, if the plaintiff recovered at all. When the Statute 5 W. & Mary C. 12, abolished this fine, it created a substitute, by requiring the plaintiff, on signing judgement, to pay a fixed sum, which he recovered back in his judgement. And the *vi et armis* seems as necessary to secure this substitute, as it did before to warrant the fine. But, by the Statute 4 & 5, Ann, C. 16, the omission of *vi et armis*, and *contra pacem*, is aided except on special demurrer. See Goulds pleadings, p. 188-9.

In this State, there never has been a fine imposed upon the defendant, nor any duty collected of the plaintiff, in an action of trespass, any more than in an action of assumpsit; and there never has been any reason for inserting

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those expressions in our writs of trespass, except preserving a reverence for ancient forms; and, when the reason for a law ceases, the law itself ceases, in many cases, at least. Moreover, the practice under some very ancient English statutes is so interwoven with the common law, it has come down almost as a part of the common law, and has become a part of the common law in this state. On one or more of these grounds, the insertion of the *vi et armis*, in civil actions of trespass, has long since lost its seeming importance, unless the omission is met by a special demurrer.

Another error is assigned upon the taxation of costs by the County Court. The error is, that witnesses are taxed whose certificates are not signed, or not sworn to. If there were a bill of exceptions allowed by the judges of the County Court, showing, that these witnesses were taxed without the consent of the opposite party, and without any other evidence than these defective certificates, there might be some weight in this error thus made apparent upon the record. But no such error now appears. The statute does not take away the power of the Court to hear evidence concerning costs, *viva voce*, and allow the travel and attendance of witness without *any* certificates in writing. And the record must show, that the County Court made some wrong decision, before their judgement will be reversed. Every presumption is in favor of the correctness of their judgement, in an action regularly before them, till the contrary appears.

The error, relied upon, which is most intimately connected with the merits of the controversy, is, the refusal of the County Court, at their April Term in 1828, to receive a plea in bar, then offered by the plaintiff in error, bringing in as they contended, a defence, which had arisen after the last continuance of the cause in December, 1827. It is now contended, that two actions were pending before said Court, at their December adjourned Term in 1827, in favor of the same original plaintiff, and against the same original defendants, for one and the same trespass; and, that judgement was recovered in one at said December Term, and the other continued—and that they claimed to plead in bar to said continued action, at said April Term,

the said recovery, and the satisfaction of the judgement, and that this plea was rejected by the Court, by reason of its being offered out of season. This plea, thus offered, is copied into the writ of error, as if it made a part of the record. So is a long bill of exceptions, that was never allowed by the judges of the Court—and neither of them ever became a part of the record, so as that error could be assigned upon them. The Clerks writing, that the plea was offered, and rejected by the Court, by reason of its coming too late, does not make it a part of the record. The party, that would raise any question upon this refusal of the Court to admit the plea, must get the judges to allow and sign exceptions to this refusal, assigning their reasons for such refusal; and thus making all appear of record. Then the Court of Errors could see whether, considering the subject matter of the plea, and the time when, and the circumstances under which the plea was offered, the party had a right then to interpose such new defence. If the plaintiff seek a remedy by writ of error, they must show themselves deprived of a right, not merely denied a motion, addressed to the discretion of the Court.

It is easy to perceive good reasons, which might exist, why this plea should have been rejected. The plea itself describes a judgement that does not necessarily appear to be for the same cause of action. It contains an averment, that it is for the same cause. But it is accompanied with no affidavit, as the English rules require. If it was offered, under these circumstances, just as the action was called up for trial at the April Term of 1828, the Court did right to reject it.

Again, the judgement was rendered at December adjourned term, 1827. As soon as it became a complete judgement, it was ready to be used as a bar to the other suit, and this before satisfaction of the same. It is not easy to see, why the plea in bar of such a recovery might not have been plead during said December Term, and before this last continuance of this suit, to said April Term. If the Court saw this to be so, there was not a right to have the plea received, and no good reason why it should be received, if not offered till said April Term.

A defendant has as good a right to present a defence,

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which arises after the action is pending, and even after plea pleaded, as if it existed before. But he must present either the one or the other in season, according to the rules of the Court, where there are rules, that apply. And according to rules of fair practice, where no particular rule applies he must not be permitted, as a matter of right, to plead so late as necessarily to push the action over to another term, and plead such matters only as he has known for weeks and months.

We discover no error in this record, and the judgement of the County Court is affirmed, with additional damages and costs.

Read & Beardsley, for plaintiff in Error.

Smith & Royce, for defendant in Error.

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WILLIAM H. WILKINS vs. JOHN H. BURTON.

That a letter, written by the plaintiff to A. C. making propositions evidently relating to transactions of B. C. there being no such person known as A: C. is admissible to the Jury as evidence against the plaintiff, of facts therein recited.

That a deed, conveying all the grantor's right to certain premises, acquired by the levy of certain executions, conveys no more, than the grantor acquired by such levy.

That, if such levy be for an undivided half, possesson taken under such deed or levy will be considered, *prima facie* as possession of half only, and that for the benefit of the other owners.

That one tenant in common cannot maintain trespass *quare clausum fregit* against his co-tenant in common, while such tenancy continues.

That there may be a tenancy in common of an inchoate as well as of an absolute title

This was an action of trespass *quare clausum fregit*, tried in the County Court upon the general issue, and brought up to this Court upon a very long Bill of exceptions, many parts in which will be sufficiently understood by the argument of counsel and the opinion of the Court, without a particular recital here. The plaintiff relied upon proving about twelve or thirteen years possession in himself of the premises, upon which the defendant entered, and upon proving the entry of the defendant at a pair of bars from the road, with timber for a barn, and erecting a barn there. And such proof he furnished. The defendant relied upon showing himself entitled as tenant in common

with the plaintiff. For this purpose he introduced the records of sundry judgements, executions, and levies of the same, in favor of several creditors of one Nathaniel Burton, who formerly owned the farm, which took the whole farm, each creditor levying upon an undivided portion of the whole farm. These were objected to as irregular, and they were admitted to be irregular to convey title, but were admitted in evidence to be followed with proof, that the plaintiff and defendant both held under them, and were thus tenants in common. Two of these judgements &c. were in favor of Tappan and Sewall, and one was in favor of Ebenezer Wiswall. The defendant produced a deed from Wiswall to himself dated July 2d. 1830, which the plaintiff contended was void by reason of his own adverse possession. And he produced the record of an action of account still pending in favor of said Wiswall against the plaintiff, with evidence of the plaintiff's resisting a recovery in said suit. The defendant then produced a certified copy of a deed from Tappan and Sewall to one Nehemiah W. Kingman, conveying their title under said levies to him; and, also, produced a letter from the plaintiff directed to *Joseph Wiswall*, tending to show, that the plaintiff held under Kingman, or under Tappan and Sewall, and proposing arrangement about a division of their common interest in the premises; together with evidence that there was no person of the name of Joseph Wiswall, that ever had any connection with these transactions. These several matters were objected to by the plaintiff, but admitted by the Court. There was a verdict for the defendant; and exceptions were taken by the plaintiff to the above decisions, and to the charge to the Jury upon the same.

Argument for the plaintiff.—1st. The plaintiff in this case contends, that, having shown an uninterrupted possession of the premises from the year 1818, up to the commencemeut of this action 1830, he can maintain an action of trespass against any intruder, except the rightful owner.

2d. It is contended, that the Court erred in admitting as evidence to the Jury the files and record of a suit, judgment and execution, and levy in favour of Ebenezer Wiswall against Nathaniel Burton, and also in favour of Tap-

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pan and Sewall against said Burton, in as much as the several levies are wholly defective.

3d. The deed from Tappan and Sewall ought not to have been admitted in evidence to the jury.

1st. Because it did not appear at the trial, that Kingman had any knowledge of said deed, had ever received it, or caused it to be recorded; and, if said deed was executed and recorded without the knowledge or consent of Kingman; it could have no effect upon the legal rights of Kingman, or upon the rights of his tenants.

2d. The levy of Tappan and Sewall being void, the deed conveyed nothing, and no evidence was offered tending to prove, that Kingman took possession of the premises by virtue of said deed, or even claimed title through, or under, said Tappan and Sewall.

4th. The Court erred in admitting a writing purporting to be a letter from the plaintiff to Joseph Wiswall, to go as evidence to the jury.—1st. Because the defendant did not show that it was ever directed or sent to Ebenezer Wiswall; and no evidence was offered to show that it was ever in his possession.—Evidence of this sort was necessary inasmuch as the whole appearance of the original (which it is the duty of the Court to inspect) affords no presumption, that the letter was ever delivered to, or received by, said Wiswall.—2d. The letter from Wilkins to Wiswall (supposing it to have been intended for Ebenezer Wiswall) dated February 11th 1824, was not legal evidence to rebut the testimony offered by the plaintiff to show, that, in 1830 when Wiswall deeded to the defendant, the plaintiff held adverse; because the evidence offered by the plaintiff was the acts and declarations of the plaintiff's four years subsequent to the date of the letter in question. And, if the showing of the plaintiff legally tended to prove, that he held adverse to Wiswall in 1830, then nothing said or done by the plaintiff from four years previous could qualify the character of the acts shown on his part. Suppose that in 1824 the plaintiff admitted the right of Wiswall, does it follow, that, at no time subsequent, the plaintiff could do and say that, which in law and fact would amount to an ouster—a refusal by one tenant in common to admit the other to enter is an ouster. If one tenant forbids entry

and says *you must get it by law if you can*—(this is an ouster,—1 Mass. R. 228, 332; Cowper, 219.—Now in 1828; the plaintiff says and does all that amounts in law to an ouster of Wiswall. It is asked again how do his declarations, made four years before, qualify, or give character to, that, which the law says amounts in itself to an ouster.

The propriety of admitting this in evidence cannot be made to depend upon the sufficiency or insufficiency of the showing of the Plaintiff as to his holding adverse to Wiswall when he deeded to Burton the defendant. The Jury were to decide upon the sufficiency of the evidence offered; and, if they have found, that the showing of the plaintiff on this point, independant of any other evidence, was sufficient to show, that he held adverse—then, surely, this either was wholly inadmissible on the ground, that although Wilkins might at a former period have admitted the right of Wiswall, not knowing but his levies were good and valid against Burton, still he was at liberty at any time subsequent, on being informed, that they were void, to resist the claim of Wiswall and hold adverse. The plaintiff was not under any legal necessity of showing, that such person as Joseph Wiswall existed in order to exclude the letter, it being a well settled principle, that every writing shall be construed according to the plain common import of the words thereof.

The Court erred in deciding, that the letter was intended for Ebenezer Wiswall and directed to Joseph Wiswall by mistake. If it be a question of *law* whether a letter is written or directed to the proper individual, then no doubt the Court are the proper tribunal to decide that question. But, if it be matter of fact, then it should be left to the Jury.

The plaintiff contends, that the Court erred in charging the Jury, that Wiswall and Tappan and Sewall became, between themselves, *tenants in common by means of their said levies.* If the levies were so far good as to divest Nathaniel Burton of the property embraced in said levies, and, consequently, to vest the title in Wiswall and Tappan and Sewall, then no doubt the charge of the Court in this particular was right

But if, as is contended by the plaintiff, the levies were to

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all intents and purposes void, so that nothing passed by virtue of them from Nathaniel Burton to Wiswall and Tappan and Sewall, then it cannot be true, that Wiswall and Tappan and Sewall became *tenants in common, by means of their levies.*

Tenants in common are such as hold by several and distinct titles, but by unity of possession, 1 Chitt. Blackstone, 136; 3 Bac. Abr. 188. Now, to suppose, that two or more persons can be tenants in common without *any title to the land* or *thing claimed*, is a proposition absurd on the face of it;—and no authority can be found to support such possessions, 9 John. Rep. 270.

And if said levies were absolutely void, and Tappan and Sewall and Wiswall went jointly into the possession of the premises, (which was not the case) they could not have been tenants in common because they would have been *dissiezors;* and *dissiezors* cannot sustain that relation to each other, 3 Bac. Abr. 190, 202, 203; Salk. 423. From which authorities it seems, that disseizors may be joint tenants, but it is clear that they cannot be tenants in common.—But in this case the defendant does not claim, that Wiswall and Tappan and Sewall were joint tenants, well knowing that there never was that unity of time, title, interest, and possession, which is indispensable to constitute a joint tenancy.

6th. The Court again erred in charging the Jury, that "the legal presumption was that, if the plaintiff entered and held possession under the title acquired by Tappan and Sewall through their levies aforesaid, he also took and held such possession for the benefit of Wiswall; or at least, that his possession was not intended to be hostile and adverse to the right of Wiswall." Now on the supposition, that the levies were good and valid, there is no such legal presumption. If, as the Jury have found, the plaintiff entered into possession under the title, which Kingman derived from Tappan and Sewall, and that title purported, as it did on the face of it, to convey all the interest in the land described in said deed, there the law presumes, that the plaintiff entered into possession as sole owner of the whole, and not for the benefit of Wiswall or any other person. 13, John. Rep. 406.

But on the supposition, that the levies are void, then, surely, there is no legal presumption, that the plaintiff took and held possession for the benefit of Wiswall.

If the plaintiff took possession without title, he was liable any moment to be sued by N. Burton! Burrows 114, Atkins case.

7. Among the evidence offered by the plaintiff to show, that he held adverse to Wiswall in 1830, was a writ and the proceedings and pleading thereon in favor of Wiswall against Wilkins, which writ was entered at the County Court in April 1828; in which Wiswall declared against Wilkins in an action of account alleging that Wilkins was a tenant in common with him of the premises whereon the barn has since been erected. Wilkins plead, that he was not his Bailiff and receiver, issue had been joined on said plea, and two trials and two verdicts of Jury in favor of Wilkins had been had, before the deed from Wiswall to Burton. The foregoing is the evidence which the Court charged the Jury was not of much weight, to prove that Wilkins in 1830, at the time Wiswall deeded to Burton, was resisting the title of Wiswall, and holding adverse.—By the foregoing evidence, it appears, that Wilkins not only denied a tenancy in common with Wiswall, but put this denial on record; and not only so but he defended successfully against the only ground, on which Wiswall relied for a recovery to wit, that he was a tenant in common. If the evidence legally tended to prove the fact, that Wilkins was holding adverse to Wiswall, then the Court should have left it for the Jury to weigh, without instructing them "*that it was not entitled to much weight.*"

Argument of Defendant's Counsel.—The *levies* of the execution adverted to, although defective and void, as against said Burton, were properly admitted by the Court, to show, that whatever interest was acquired by Burtons creditors, under the levies aforesaid, was a common interest.

They were by virtue of *said levies* constituted tenants in common of the premises, and, as between themselves, one cannot insist on any defects in the levies as against the other.—*Wiswall* vs. *Wilkins*, decided Jan. Term, 1831 in

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this County; Chip. Rep. 369, *Bush* vs. *Whitney*; 13 Mass. Rep. 529; 6 Con. Rep. 165, *Lee et al* vs. *Hinman*.

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The point once established, that the several creditors of Nathaniel Burton are to be regarded as tenants in common of the land in question, all who derive title through them must be considered as sustaining the same relation. 3 Vt. R. 281, *Brooks* vs. *Chaplin*; 15 John. Rep. 179.

Hence it follows, that, if the deed from Ebenezer Wiswall to defendant is a valid instrument, (on which we shall have occasion to remark hereafter) and the title of the plaintiff is derived from Tappan and Sewall, the plaintiffs and defendants must be considered tenants in common of the premises; and this action cannot be sustained.

2d. We will next consider, whether the deed from Wiswall was a valid instrument. This must be determined by an inspection of the deed itself, and the facts developed at the trial of the issue.

1st. Our ground of objection to this deed, taken and insisted on at the trial, was the pretended adverse possession of the plaintiff, at the time of its execution—and the plaintiff was permitted to introduce evidence for the purpose of establishing that fact.—John. Rep. 102, *Jadwin* vs. *Jay*.

Whether the plaintiff was, or was not in adverse possession of the premises, was a question of fact for the jury to find under the charge of the Court, and we insist, that subject was properly submitted to the Jury; for the Court expressly charged them, "that, if upon the whole they should "find, that, at the date of said deed, the plaintiff was in "possession, claiming to hold the share or portion of Wis-"wall adversely to him and denying his title thereto, then "said deed to the defendant, was to be treated as void, "and the plaintiff was entitled to recover. And if they did "not find such adverse possession then said deed to take "effect and the defendant was entitled to their verdict" upon a previous supposition, that this deed, together with the other evidence in the case, made out a tenancy in common between the plaintiff and defendant. Hence we insist, that the finding by jury, settles the question, that the plaintiff was not in possession of the premises, claiming and holding the same adverse to the title of Wiswall at the

time that the deed was executed; unless, upon anothe point connected with this subject, the Court misdirected the Jury. Upon that point the Court instructed the jury "that the legal presumption was, that, if the plaintiff entered and held possession, under the title acquired by "Tappan and Sewall, through their *levies* aforesaid, he also took and held such possession for the benefit of Wiswall; or, at least, his possession was not intended to be "hostile and adverse to the right of Wiswall." When a person, being tenant in common with others of a piece of land, enters into possession, we understand the legal intendment to be, that he holds possession as well for his cotenants as for himself, and would be liable to his cotenants for their proportion of the rents and profits without any special agreement to account therefor, and that, in order to rebut that presumption, it does require, in the language of the Judge "strong and convincing evidence," 16 Mass. Rep. 1, *King* vs. *Goodwin*; 2 Blk. Com. 150; 17 Mass. Rep. 282; 1 East. 568, *Peaceable* vs. *Read* et al.

But again, upon this part of the case, the plaintiff pretends, that the Court improperly admitted a letter, written by the plaintiff, and purporting to be addressed to *Joseph Wiswall*, which the defendant offered to rebut the plaintiff's evidence of adverse possession.

Two objections have been made by the plaintiff to this document. 1st. That it was irrelevant. 2d. That it contained an offer of compromise. The first is overthrown by the whole tenor of the letter, for it was competent and highly proper for the defendant to introduce evidence to show the character of the plaintiff's possession. And the second objection cannot prevail, when we consider the amount of what was offered, which was the concessions and acknowledgements of the plaintiff, aside from and disconnected with, any offers of compromise; and the fact, that the same letter contained an offer of compromise, cannot interpose to shut out proper and material evidence incorporated in it.

One question only, upon this subject remains. Did the Court err in undertaking to decide that the letter in question was intended for Ebenezer Wiswall? This point it be-

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came necessary for the Court to settle, and which was properly within their province before the evidence could go to the Jury, and they pronounced upon it from such evidence as they had before them; and whether it was, or was not, sufficient to establish that point in the opinion of this Court, is now wholly immaterial. This Court will not undertake to judge over the heads of the court below on that subject.

3d. Was the title of the plaintiff derived from Tappan and Sewall? is the next point we propose to consider—and this question is to be determined by the admissibility in evidence of the deed from Tappan and Sewall to Kingman;—for if, by virtue of that deed, a tenancy in common was created between Kingman and Wiswall, the plaintiff holding under Kingman's, and Wiswall's deed to defendant, would constitute the plaintiff and defendant tenants in common of the premises in question. The principal objections to this deed, on which the plaintiff relies are first, to the form of its execution and secondly that it was insolvent.

1st. The deed was executed in the State of New York, and, if an acknowledgement was taken there, it is to be presumed, that it was taken agreeably to the laws of that state. If so, it is admissible in evidence in our Courts. 1 Vt. Rep. 336, *Middlebury College* vs. *Cheney*.

2d. It becomes necessary for the defendant, to introduce this evidence in order to connect the chain of title from Tappan and Sewall to the plaintiff, and to make out a tenancy in common, between plaintiff and defendant, and this clearly shows sufficiently its relevancy.

If this deed, then, was properly admitted in evidence, the question of Kingman being tenant in common with Wiswall, is set at rest by the finding of the Jury; for it must have been solely on the ground, that the defendant had satisfactorily shown himself tenant in common with plaintiff that the Jury gave their verdict in his favor.

If then, as the jury must have found the fact, the plaintiff and defendant were tenants in common of the land in qnestion; they have each an equal right to the possession and, the one cannot sustain an action against another for an entry into the premises and using and occupying the same.

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HUTCHINSON, C. J.—The breaking and entering the plaintiff's close, as proved on trial, was the bringing on timbers and erecting a barn on the premises in possession of the plaintiff. The questions, raised on the Bill of exceptions, allowed in the County Court, relate to the tenancy in common of the plaintiff and defendant. There is no intimation, that the defendants acts were inconsistent with this tenancy in common. No expressions proved or offered to be proved, tending to show, that he would wish to exclude the plaintiff from any part of the premises. It must be taken as an entry consistant with his claim of tenancy in common.

The levies of sundry executions were offered by the defendant, showing, that sundry creditors of Nathaniel Burton had this whole farm set off to them as tenants in common; and this to be followed with other testimony bringing down such tenancy in common to plaintiff and defendant. These were objected to but admitted. For various seasons, these levies are too defective to convey title from N. Burton to said creditors; but they were correctly admitted to show the character of the possession taken under these levies, which has probably grown into a perfect title. For it does not appear that Nathaniel Burton or any other creditors have ever interfered to hold against these levies. These levies gave, to each creditor, a seizin of an undivided interest through the whole farm; making their possession a tenancy in common. They might be tenants in common of an inchoate right, as well as one that is perfect. This has been decided in a suit before this Court, heretofore, which I suppose related to these same premises. The deed from Tappan and Sewall, two of these creditors, to Kingman was correctly admitted. This deed does not, as was contended by the plaintiff's counsel, convey the whole land, but only their interest in it. This deed so refers to the levies as to give it the same operation as if it, in terms, conveyed the undivided portion, described in the levy to them.

The letter from the plaintiff to Joseph Wiswall was correctly admitted as evidence, to show, that the plaintiff held under Tappan and Sewall. The object of the testimony was, to prove the fact by the concession of the plain-

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tiff. The subject matter of the letter tends to prove this fact. There appearing to be no such person as Joseph Wiswall, and the actual situation of Ebenezer Wiswall who was one of these levying creditors, calculated to invite such a letter, the jury might well infer that Ebenezer Wiswall was the person, to whom the letter was intended to be addressed, and the word Joseph written by mistake merely. More especially is this the case, when the letter is produced by Ebenezer Wiswall; or, what is the same, by the defendant, to make out his title under said Ebenezer Wiswall.

But the plaintiff's counsel contend, that the Court denied, that this letter was intended for Ebenezer Wiswall, and not Joseph; and did not leave that question to the jury. We do not so understand the exceptions upon this point. The testimony is stated, which tends to show, that Ebenezer was intended; then the case adds, the Court admitted the letter on the ground, that it was intended for Ebenezer Wiswall, and wrongly directed by mistake. Their meaning must have been, that there was sufficient testimony of that fact to go to the Jury with the letter. Just as when the execution of a note is disputed, it is not permitted to be read to the jury till the Court have heard evidence go to the jury, tending to prove the execution. Then the note is read.

This letter being admitted, and the defendant, having produced a deed from said Ebenezar to himself, dated in the year 1830, showing his right to hold as tenant in common of the whole premises, the plaintiff offered to show, that he held adverse to Wiswall's title, at the date of Wiswall's deed to the defendant. For this purpose he read the record of an action, before that time tried, in favor of said Wiswall against him the plaintiff, charging the plaintiff as Bailiff and receiver to said Wiswall of the rents and profits of the lands included in said several levies. Wilkins had plead, that he was never Bailiff and receiver and issue was joined, and two verdicts for him, (Wilkins,) the defendant, in that action. The charge of the Court upon this evidence is objected to. This evidence was left to the jury, for them to weigh, accompanied with the observation from the Court, that it was of very little weight upon the

present issue. It is objected now, in argument, that this was giving an opinion upon the weight of evidence. We do not practice giving our opinion to the jury upon the weight of evidence; nor are we prepared to decide such a proceeding to be error. But surely it cannot be error in this case, where the observation made by the judge was strictly correct. The issue, in that case, was not formed upon the fact, whether Wiswall and Wilkins were tenants in common; which would have been the proper fact to put in issue, if the action was brought under our Statute, and Wiswall relied upon his tenancy in common with Wilkins, as a ground of recovery; but the issue was formed upon the fact, whether the said Wilkins was Bailiff and receiver of said Wiswall. This might have been decided in favor of Wilkins on the ground, that no rent and profits had been received; or for want of some contract to bind him as Bailiff and receiver to the said Wiswall. This was so very light testimony on the question of tenancy in common, or of adverse possession, raised in this action, it is even doubtful, whether it was admissible at all, as evidence upon such issue. That being an action as Bailiff and receiver, it must be taken to be a charge that the defendant was so by appointment; and the question of tenancy in common could not legally arise. Will. Rep. 208, *Wheeler* vs. *Horne*.

Read, for plaintiff.

Hunt & Beardsley, for defendant.

EBENEZER WISWALL VS. WILLIAM H. WILKINS.

Where several creditors extend their executions each upon an undivided moiety of their debtors land, they become tenants, in common thereof.

Where one of several cotenants is in the occupancy of lands, he must be considered as possessing not only for himself, but for the others, although there does not appear to be any contract or agreement between them.

A cotenant in possession, not denying the right of other cotenants to a participation in the profits, is liable to be called to account by each, therefor.

This was an action of account against the defendant as Bailiff and Receiver of the plaintiff in respect to the issues and profits of certain lands in St. Albans; to which the

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defendant pleaded that he was never bailiff and receiver—on which plea issue was joined.

The case which the plaintiff undertook to establish was, that by the levy of an execution in his favor against one Nathaniel Burton made in 1811, he acquired a title to an undivided half or moiety of the lands mentioned in the plaintiff's Declaration; that the defendant or those under whom he holds, at or about the same time acquired a title to the other half or moiety of said lands, by other levies of executions against the said Burton;—and that the defendant either owning said last half or moiety, or being tenant of the same under the owner had for many years enjoyed and occupied the whole of said lands, taking all the profits thereof to himself.

The plaintiff having introduced evidence showing a title in said Burton previous to the levies of said executions, offered in evidence the levy of the execution in his favor against said Burton, made on the 9th day of October, 1811. The defendant took several objections to said levy. 1st. That it did not appear by the officers return that he made any demand of payment of the execution of the judgment debtor, or that the latter neglected or refused to expose goods and chattels to satisfy said execution. 2d. Because an undivided interest in each of said lands was extended and set off. 3d. That the appointment of appraisers was not legally made—and 4th. That the oath to the appraisers was not legal or not legally administered—and because it did not appear that said appraisers were resident in the town of St. Albans—Whereupon the Court decided that the levy was defective and did not pass any title to the plaintiff.

The plaintiff then offered to show the title and possession of the defendant to the other half of said lands according to his preliminary statement aforesaid, originating in sundry levies in favor of Tappan and Sewall, and other creditors of Burton; contending that upon the proof of such title and possession the defendant should be legally regarded as a tenant in common with the plaintiff—it not being shown that Burton had ever contested the title of the plaintiff. But the Court decided that the evidence offered would not entitle the plaintiff to a verdict, unless it were also proved that the defendant had enjoyed and occupied

the moiety claimed by the plaintiff by *contract* or *licence* of the plaintiff and in subjection to his supposed title—and no evidence of such *contract* or *licence* being offered, the Court directed a verdict for the defendant—which was returned accordingly and judgment rendered thereon. To all which decisions and directions of the Court the plaintiff accepted; and the case now comes up to this court for consideration.

D. Read for plaintiff.—1st. The plaintiff contends that the defendant is estopped from denying the title of the plaintiff, as they both derive title from the same common source. 1 Chip. R. 369, *Bush* vs. *Whiting*; 2 Stark. Evi. 386, 387.

Hence the levies of the executions although they might be illegal and void as against Burton should have been admitted by the Court to show a tenancy in common between the parties. 9 John. R. 174, 11 do. 461.

2d. When undivided moities of lands are set off on execution to different creditors they are legally regarded as tenants in common. 6 Con. R. 165; 13 Mass. R. 529.

3d. Under the third section of the act relating to actions of account, one tenant in common can charge another "as bailiff, for receiving more than his just proportion of any estate or interest" without any *appointment*, *contract* or *licence* to that effect. Stat. 142; Swift Dig. 580, do. 581, do. 582; Co. Lit. 172, do. 200; 1 Chitty. Pl. 482-3. Willis R. 208.

J. Smith, for defendant.—Defendant contends that the levy of the execution in favor of the plaintiff against Nathaniel Burton, was void, and properly rejected by the County Court for the several causes mentioned in the bill of exceptions; also the levy of the execution in favor of said Tappan and Sewall against said Burton.

The plaintiff having failed to show, either a legal title to the moiety of land described in his declaration, or that the defendant enjoyed or occupied the same by contract, or licence from the plaintiff, the County Court did right in directing the Jury to return a verdict for the defendant.

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PADDOCK, J.—In this case, the plaintiff, Wiswall calls on the defendant to render an account for the rents and profits of certain lands and tenements, of which the Plaintiff claims to be a joint tenant with the defendant.

It appears that in 1811, the plaintiff, together with the defendant and others under whom the defendant claimed to hold, levied their *executions* on the houses and lands of one *Burton* their debtor; the levies were all made by the same officer, and on the same day, who returned that he put each of the creditors in possession.

The levy of all the *executions* appear to be defective; and had *Burton* resisted the right thereby acquired by his creditors, there cannot be a doubt but the levies would all have been declared void. But from his silence, it is to be presumed that he acquiesced at the time, and has ever since been content, and now it is too late for him, to disturb them, for the title has become perfect in his creditors, the statute of limitation having run in their favor.

The question then is, whither by the levy, the execution creditors became tenants in common; and of that, there can be no doubt, as each execution was extended upon an undivided portion of the whole lands levied upon, they could hold in no other manner; and although it does not appear that there was any contract entered into between the plaintiff, defendant and the other claimants that the defendant should occupy and enjoy the premises, yet he must be regarded as possessing not only for himself but for his co-tenants; nothing appearing from the case that he had ever ousted them of their possession, by setting up a title in himself or denying their right to possess, or a participation in the rents and profits. The presumption is, that he has occupied by the mutual consent of all concerned, and is liable to be called to account by each of his co-tenants. Woodfall's Landlord & Ten. 89.

This being the view which the Court have taken of the case, the judgment of the County Court must be reversed, and a new trial granted.

Luther Darling *vs.* Caleb F. Hall.

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A charge on Book, omitted by mistake in a settlement between the parties may properly be carried to a new account, and in an adjustment of their subsequent deal it would be the duty of the auditor to allow it if just, notwithstanding the settlement.

This was an action on Book, in which the Auditors reported a small balance due the plaintiff. The defendant took exception to the report in the County Court, but that Court overruled the exception, and rendered judgment on the report. Whereupon the defendant took exception to their decision, and brought the matter before this Court.

The only question, worthy of notice arose out of a charge in the plaintiffs account, of a quantity of corn, which the auditor disallowed, but reported with respect to it, that it was delivered by the plaintiff to the defendant, but prior to a settlement of all book accounts, which had intervened between the delivery and the subsequent account, to recover which the action is brought. They also found, that the corn had never been accounted for. The County Court reversed their decision with respect to this item, and allowed the charge.

Hunt and Beardsley for the defendant, insisted, that this charge could not be recovered in an action on book, but that the party was driven to his special action on the case. That, although the charge might have been omitted by mistake, yet a recovery in this form of action, was barred by the settlement. They cited Kirby's Rep. 127; 2 Conn. Rep. 481.

H. E. Hubbell, contra, contended, that a party is not precluded from charging on book, that which is a proper subject of book charge, notwithstanding there has been a settlement on book between the parties if such item was omitted in the settlement. He cited *Austin vs. Berry et al* 3 Vt. Rep. 58.

Phelps, J.—The fact that a settlement had intervened, subsequent to the delivery of the corn, creates a presumption that the charge has been accounted for. Yet that presumption may be rebutted, and it seems in this case it

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was so. There is nothing certainly in the nature of an adjustment of Book Accounts, which operates to bar a claim not brought into the adjustment. If then the presumption of fact is removed, the claim remains unaffected by the settlement; and if the party have any remedy, it is difficult to conceive why he is not entitled to that which was originally the appropriate one.

This is no more than the common case of an item omitted in posting, which is very properly carried to a new account. Where the account continues to run between the parties, as in this case, there seems to be no reason why an omitted item may not be adjusted in it. Had there been no further account between the parties, the case might perhaps be different.

The case of Austin *vs.* Berry, appears to us in point.—The agreement in that case originated perhaps in a supposition, that without it, the settlement would bar every remedy. At all events the effect of that agreement would only be to save the right of the party, without reference to the remedy. Aside of that agreement the cases are parallel.

The danger to be apprehended from relying on the party's own oath, is no greater than what is every day experienced, in the great latitude already given to this species of testimony. The question whether it shall be removed rests with the Legislature, but under the existing law, the only safeguard is in the caution and sagacity of triers.

Judgment affirmed.

Boston Type and Stereotype Foundry, *vs.* Jeduthan Spooner.

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That there is no such person in *rerum natura* may be plead in abatement, and the same may be plead in bar.

The rule is the same where the plaintiff sues as a corporation.

In suits by a corporation if the defendant means to insist on the want of a corporate capacity in the plaintiff to sue, he must do it by plea in abatement or bar.

The rule that a plea in abatement must give the plaintiff a better writ, has relation only to those cases where the defendant can give and the plaintiff have a better writ.

It is not a criterion in all cases to determine whether a matter is to be plead in abatement or bar to determine whether it can be so plead as to give the plaintiff a better writ.

This was an action of assumpsit. The declaration was silent as to any act of incorporation. The defendant plead in abatement that there never was a person in being called or known by the name of the Boston Type & Stereotype Foundry. To this plea there was a demurrer, upon which a judgement of respondeas ouster was rendered. To this judgement the defendant excepted. After a final judgement rendered for the plaintiff at the County Court, the case was brought into this Court for decision upon the exception.

Counsel for the plaintiff, contended that when the defendant denies the existence of such a person as the plaintiff, it must be done by way of a plea in bar, and not by plea in abatement. This is not a case of misnomer of the plaintiff which only goes to the writ, but the plea alleges that there is no such person in being as the plaintiff. If this be true, then neither this or any other action can be sustained. The plea goes to defeat totally and forever a recovery. 1 Bos. & Pull. 40, *Mayor & Burgesses of Stafford vs. Bolton*; 1 Chit. Pl. 445; 2 Starkie, 224; 4 T. Rep. 227.

Counsel for defendant.—In this cause the defendant contends that the county Court erred in deciding that the plea was insufficient, as the plea in abatement was a proper plea. Com. Dig. Title Abatement, 16; and authorities there quoted.

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2. That if the plea was wrong, yet the declaration being bad, the plea was sufficient; it being a rule in law that a bad plea is good enough for a bad declaration.

WILLIAMS, J.—In this case the defendant plead in abatement that there was no such person or corporation as the Boston Type & Stereotype Foundry. This plea was demurred to, and a judgement of *respondeas ouster*, rendered. To this judgement the defendant excepted. After a final judgement rendered for the plaintiff, the cause is brought here for a decision on the question of law arising on the exception, and presents the enquiry, whether the fact set forth in this plea, was the proper subject of a plea in abatement.

There can be no doubt, but that the fact, if verified is an answer to the suit. In every action commenced in a Court there must be a party against whom a judgement may be rendered, and an execution issue. The defendant is not compelled to answer to a suit, unless it is prosecuted in the name of a person either natural or artificial against whom he may have a judgement, and an execution to obtain satisfaction of the same. He is not under the necessity of resorting alone to the recognizance, which a plaintiff must procure on praying out a writ, in order to collect his cost if he obtains a judgement therefor; as the recognizance is only an accumulative security for the same.

This position is so obvious that it has not been controverted, but the only objection taken to the plea is that the fact should have been plead in bar. And if it is true, not only that it could have been plead in bar, but that it could not be plead in abatement, the objection is well taken. It does not follow however that because the defendant might have availed himself of this defence by plea in bar, therefore he cannot avail himself of the same, by plea in abatement. As a general rule, matter in bar cannot be plead in abatement, but to this rule there are exceptions, and the case under consideration comes within the exceptions. The nonjoinder of a person who ought to have been made a plaintiff may be plead in abatement, and advantage may also be taken of it under the general issue. In *replevin*, the defendant may plead property in himself or a

stranger either in abatement or bar. Certain personal disabilities which entirely defeat the suit, may be plead in abatement or bar, as outlawry for felony, attainder, alien enemy. Coverture is only pleadable in abatement inasmuch as it does not destroy the cause of action, but only precludes the person from maintaining the suit.

It would seem from the principles on which pleas in abatement are founded, that the defence relied on, by the defendant could only be taken advantage of by a plea in abatement, as it merely denies that there is any right in those claiming to prosecute, or that there is any such person as the plaintiff; leaving the contract to be enforced by those from whom the consideration proceeded. The authorities, however, show that it is a proper subject for a plea in abatement or bar.

That there may be a plea in abatement, to the disability of a plaintiff, denying his existence, shewing that there is no such person in *rerum natura*, as that at the commencement of the suit he was a ficticious person is recognized in 1 Com. Dig. tit. abatement, E. 16; 1 Chitty pleadings, 435-6; *Guild* vs. *Richardson*, 6 Pick. 370; *Doe* vs. *Penfield*, 19 John. 308. That the same matter may be plead in bar, we find in Bro. Abr. Misnomer, 93, as quoted in the case of the *Mayor & Burgesses of Stafford* vs. *Bolton*; Bos. & Pull. 40, 44.

These authorities are decisive in favor of the present plea and against the position assumed by the counsel for the plaintiff, viz. that the defendant could only avail himself of this defence by plea in bar, unless a different rule should prevail when a suit is brought by a corporation, although there is nothing in the declaration in this case from which we can directly infer that the plaintiff's were suing as a corporation. That there is no difference however in this respect may be learned from Bro. Abr. & the case from Bos. & Pull, before mentioned where as it respects this plea in abatement, viz. that there is no such person in *rerum natura* or no such body politic, both corporations and natural persons are considered as equally entitled to the benefits of the same. The only ground upon which it can be urged that there should be any difference in a suit in the name of a natural or artificial person is this; there

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are some decisions, that where a corporation sues either on a contract or to recover real property, they must on trial under the general issue, prove that they are a corporation. 8 John. 295, 14, do. 245, 416. It is a general rule that a plea which denies what the plaintiff is bound to prove on the general issue is bad, on special demurrer. But if this is an objection to the plea under consideration, it is equally fatal to a plea in bar denying that there is any such corporation; and that *nul tiel* corporation, is a good plea, is admitted by Kyd, in his treaties on corporations 284, and in a note to 1 Saun. 340. Further it was decided in the case of the proprietors of *Kenebeck* vs. *Call*, 1 Mass. 483, that the plea of the general issue admitted the existence of the proprietors as named in the writ. It was also said by the Supreme Court of the United States, in the case of Conrad, plaintiff in error, against Atlantic Insurance Company, 1 Peters. 450, that by pleading to the merits the defendant necessarily admitted the capacity of the plaintiff to sue. In a more recent case, *Propagation Society* vs. *Clark et al*, 3 Peters. 408, on a point made and presented to the Court, it was decided that if the defendant meant to insist on the want of a corporate capacity in the plaintiff to sue, it must be insisted on by a special plea in abatement or bar, p. 501.

It has also been objected to this plea as a plea in abatement, that pleas in abatement must in all cases give the plaintiff a better writ, *i. e.* must be so plead as to enable the plaintiff in a subsequent suit to avoid the error committed in the first. This as a general rule is undoubtedly true. It obviously, however has relation to those cases only where it is in the power of a defendant to give and where the plaintiff can have a better writ. As where the plea is founded on some fact of which the defendant is presumed to have knowledge. It cannot apply to those cases where a plaintiff cannot have a better writ. In the case of outlawery, attainder, alien enemy, and in other cases where the right of action is suspended on account of the disability of a plaintiff to sue, he cannot have a better writ while the disability exists. It is sufficient in a plea in abatement for any of those causes to set forth the fact without attempting that which is impracticable. It will

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be found that it is by no means a criterion to test in all cases whether a matter must be plead in abatement or bar, to determine whether it can be so plead as to enable the plaintiff in a subsequent action, to obviate the facts set forth in defence. As we find from the authorities that the subsequent matter of this plea is proper for a plea in abatement, and if that which is set forth is true, no better writ can be made in the name of the plaintiff, the writ must abate.

The judgement of the County Court must therefore be reversed, and judgement entered that the writ abate.

Smith, for plaintiff.

Stevens, for defendant.

BRAINARD & NEWTON *vs.* BURTON & WITHEY.

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A to maintain trespass against B. for taking a personal chattel, must prove, that at the time of taking, he had an *actual* or *constructive possession* of the chattel; and also a *general* or *qualified* property in the same.

If A. lease land to B. for the rent of $50 per annum, and B. agrees that A. shall have a hold, or lien on the crops raised on the premises until the rent is paid, it is merely an *executory* contract, and by it A. acquires no *general*, nor *qualified* property in the crops before they are raised and delivered to him by B.

Where a constable makes an imperfect return upon a writ, which is delivered to the Justice of Peace, who signed it, it becomes a part of his files, and by leave of such Justice of Peace, the constable may amend his return, if such amendment will not affect the interest of third persons, and be consistent with the truth.

In action of trespass by A against B. for carrying off a chattel, B. under the general issue may give in evidence, that at the time of taking, the chattel was in the actual possession of C. and he had the general property in the same: showing these facts will defeat A's. recovery without showing that the chattel was taken on legal process against C. when it was carried off.

The Court is bound to give an opinion to the jury upon a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact.

This was an action of Trespass originally commenced at the County Court, and there tried on the general issue. Upon the trial of the case before the jury, the opinions and charge of the Court were made the subject of a Bill of exceptions, upon which the case now comes up to this Court for further adjudication. Most of the facts set forth in the Bill of Exceptions are sufficiently stated in th

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opinion of the Court for a full apprehension of the case.

Here it will be necessary merely to state that the property for which this suit was commenced was taken by one of the defendant's as agent and the other defendant as constable of St. Albans, by virtue of a writ of attachment and also an execution in favor of one John H. Burton, which were shown in justification. But being objected to by the plaintiff they were excluded by the Court on the ground, that they were not legally served. The defendants then moved the Court for leave to the officer to amend his returns, which was refused.

The briefs, not having been furnished the reporter, the arguments and names of counsel are necessarily omitted.

BAYLIES, J.—The plaintiffs have brought their action of *Trespass* against the defendants for taking thirty bushels of ears of corn, which the plaintiffs allege was their *property* and in their *possession* when taken. The defendants pleaded the general issue, *not guilty*, with notice of special matter to be given in evidence.

The plaintiffs to maintain their action were bound to show, that at the time when the injury was done, they had either the *actual* or *constructive* possession of the ears of corn; and also had either a *general* or *qualified* property in the same. 1 T. R. 480; 4 T. R. 490.

Now, do the facts in the case show any such possession, or property? In substance, the facts are, that one *Briant* was the owner of 40 acres of land, with buildings thereon in St. Albans, which land and buildings he leased to the plaintiffs in April 1830, for one year; and soon after, the plaintiffs leased the same land to Flanders and Burbank for the same term, they to pay $50 rent, and "*the plaintiffs to have a hold or lien on the crops raised on said premises, until the rent was paid.* Flanders and Burbank took possession, and agreed on a division of the land between them, so that Burbank was to pay $30 and Flanders $20 of the rents. Soon after *Flanders* took possession, he called on Newton, one of the plaintiffs, and told him, that he could not carry on his part of the farm on account of his creditors troubling him, and asked Newton what he should do? Newton told him to let out his part of the

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farm, and do the best he could. Flanders then let out two acres to one Wilder, who agreed to plough, and plant the land with corn, and hoe the same. The crop was to be divided standing in the field, and each to harvest his share. The crop was divided in the field, and each harvested his own: Flanders put his share into a crib on the premises, nigh his house, and mixed his other corn with it. Wilder never knew that the plaintiffs claimed any part of the corn raised by him on the two acres.

The foregoing facts are insufficient in the law to show that the plaintiffs had either an *actual* or *constructive* possession of the corn; or had a *general* or *qualified* property in it, when the defendants took the corn, as the property of Flanders.

But the plaintiffs rely mainly upon the aforesaid words, "*the plaintiffs to have a hold or lien an the crops raised on said premises until the rent was paid,*" to entitle them to recover in this action; inasmuch as the corn was raised on the premises, and the rent had not been paid. Here I would observe that the *words*, relied on by the plaintiff's, do not constitute a mortgage, or pledge of the crops; for, at that time, the contract was made, the crops were not raised, and could not be mortgaged, or pledged: the *words* relied on, constituted an executory contract, by which the plaintiffs were to have a hold or lien upon the crops, when raised, by their being put into the plaintiffs hands as security for payment of the rent. This case is analogous to many other *executory* contracts, where the thing contracted for is not in existence, and nothing passes by the contract, till the thing does exist, and is *actually delivered.*— See *Mucklow et al* vs. *Mangles*, 1 Taunt. 319; *Robinson* vs. *McDonnell*, 2 B. & A. 134; *Stringer* vs. *Murray*, 2 B. & A. 248; *Bonsey* vs. *Amee*, 8 Pick. 336.

In the case at bar, the facts do not show, that the corn in question was delivered to the plaintiffs; therefore they have failed to show possession, or property in the corn, and cannot recover.

The defendants in the course of the trial, moved the County Court, that the officer have leave to amend his return on a certain writ of attachment, which was offered in evidence; and also to amend his return on a certain writ

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of execution, which was offered in evidence. On these two writs the officer took the corn in question, and imperfectly made his returns. But the writs, with the returns thereon, belonged to the files of the Justice of the Peace, who signed them, and to whom they had been returned; therefore they should not be altered without the consent of such justice. So the County Court were right in refusing leave for the officer to amend his returns.

But it *seems*, if the application, for the officer to amend his returns, had been made directly to the Justice of the Peace, who signed the writs he might with propriety have permitted the amendments, if they would not effect the interest of third persons, and would not be *false*: The officer however would be answerable for their falsity. 11 Mass. Rep. 413, 480.

Let us enquire, what evidence the defendants might give under the *General Issue*, which was pleaded? We have stated, that it was incumbent on the plaintiffs to show, either an *actual* or *constructive* possession, and also a *general* or *qualified* property in the corn, when it was taken; therefore any thing, which would tend to disprove those facts, the defendants might give in evidence under the General Issue: they might prove under this Issue, that Flanders had the *actual* possession, and *general* property in the corn when it was taken. If the facts were so, then the defendants did not trespass upon the plaintiffs rights in taking the corn, and they cannot maintain their action. So, that the pretended conveyance of the corn from Flanders to the plaintiffs was made to delay, and defeat the crediors of Flanders, and was void as it respected them; and that defendants took said corn by legal process to pay, and satisfy a *bona fide* debt of said Flanders, might all be given in evidence under the General Issue.

The defendants requested the Court to charge the Jury, "that if Brainard and Newton rented the farm to Burbank, and Flanders, at a rent of fifty dollars a year as above stated with an agreement at the same time, that Brainard and Newton should have a hold or lien on the crops raised on said premises, until the rent was paid, and that this was the only title the plaintiffs had to the corn, in question, that the plaintiffs were not entitled to recover in this ac-

tion." This was a plain request, not involving any question of fact, and was pertinent to the issue, and the Court was bound to meet it by a full expression of their opinion of the law to the jury; but it *seems* the Court carefully avoided the expression of any such opinion, which is error.

The judgement of the County Court is reversed and a new trial is granted.

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MARTIN WIRES *vs.* WM. P. BRIGGS.

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An Attorney who places his name as such on the back of a writ which he delivers to an officer to serve, does not *thereby* make himself liable for the officers fees.

Dictum. Where an officer has been accustomed to make charges to an attorney for services of clients writs delivered by said attorney, who had previously settled such charges without questioning their legality, the law may imply a promise to pay subsequent charges of a similar nature.

This was an action on Book account, and from the auditors report the following facts appeared. That the defendant was an attorney, and prayed out, two writs from a Justice of the Peace, in favor Lansing King, against David Wilcox, upon which his name as an attorney for said King was indorsed; that he placed the writs in the hands of said King, who inclosed them in a letter to H. Stowell of Cambridge, requesting him to hand them to a legal officer to serve and return; that said Stowell delivered them to the plaintiff a Sheriff's deputy, by whom they were legally served and returned; that judgments were rendered in the suits, and executions issued, upon which the defendants name was indorsed in the same manner as upon the writs, and came to the hands of the plaintiff through the same channel of communication, by whom they were legally served and returned; and that in each case the plaintiff charged his fees to the defendant. From these facts the plaintiff contended that the defendant was liable for the fees charged him aforesaid. The auditor allowed them to the plaintiff, and upon a reference of his report to the County Court his decision was confirmed. But exceptions being taken to this judgment of the County Court by the defendant, the case now comes here for a final adjudication.

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BAYLISS, J.—The law respecting principal, and Agent is applicable to this case. "In general where a man is known to act merely as an agent, where the principal is known, and there is no express engagement by the agent, nor circumstances from which it may be inferred that the credit is given to him, the rule is, that the agent, though the person immediately making the contract, is not subject to personal responsibility. It is laid down by very old authority, that if a servant by express words do not bind himself, if the thing come to the use of his master, he is not liable at all. No rule of law, it has been said, is better ascertained, or stands upon a stronger foundation than this, that where an agent names his principal, the principal is responsible, and not the agent. Paley on Agency 289. A lawyer by endorsing his name as an attorney on the back of a writ, which he delivers to an officer to serve, does not thereby make himself liable to such officer for his fees: By the endorsement he makes it known to the officer, and to all other persons concerned, that he acts as agent, or attorney of the plaintiff, who is principal, and liable for fees. From the endorsement on the writ, the law does not imply a promise on the part of the lawyer, that he will pay the officer his fees for service. This point was decided by this Court in *Washington County*, March Term, 1826, in the case of *Hutchinson & Cushman* vs. *Frederick Richardson* in Error. And that decision must be the rule to govern us in this case, notwithstanding the New York cases, which are referred to by plaintiffs counsel in 5 J. R. 252; and 9 J. R. 114. It is true, that in some cases the law may imply a promise on the part of a lawyer to pay fees for the services of client's writs; as where the officer had been in the constant practice of charging his fees for such services to the lawyer, who from time to time, had settled such charges without questioning their legality:—from such practice the law may imply a promise to pay for subsequent services. But in the case at bar, there is no evidence, that such practice existed between the parties before the plaintiff made his charges on book against the defendant. And as there is nothing in the case from which the law can infer a promise on the part of the defendant to pay the plaintiff his fees

charged on book against the defendant; and as there was no express promise to that effect, the judgement of the County Court for the plaintiff is reversed; and judgement is rendered by this Court, that the defendant recover his costs.

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Hubbell & Stowell, for plaintiff.

Hunt & Beardsley, for defendant.

WILLARD GORDON *vs.* LUTHER TABOR.

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That it is not usual for the Court in this State, to intimate to the Jury any opinion upon the weight of evidence.

That the Court's excluding evidence offered by the plaintiff, after he had pronounced himself thereon, saying it was too late, which evidence was not pertinent to the issue, is no ground for a new trial.

That the Court intimated, that the plaintiff had not made out a *prima facia* case, and afterwards submitted to the jury what evidence there was, is no ground for a new trial.

That the Court instruct the jury to decide the cause upon the consideration of two matters only, where there are several others, that should have been coupled with them for their consideration, is a ground for granting a new trial.

This cause came up from the County Court upon the following Bill of exceptions, to wit:

This was a special action on the case in form of assumpsit, brought by the plaintiff, against the defendant for immoderately driving the plaintiff's horse. The plaintiff in support of his declaration introduced testimony, tending to prove, and insisting that he had proved, the following facts. That, some time in the latter part of Sept. 1830, the defendant applied to the plaintiff for the purpose of hiring a certain horse of the plaintiff, to go a journey from Grand Isle to Topsham in this State; that the plaintiff consented to let the defendant have his horse; that the defendant did take the plaintiff's horse and started his journey; that the defendant went to Tobias's wharf in Grand Isle, and there took the Steam Boat, and went to St. Albans bay. Thence the defendant proceeded to the village of St. Albans, where he arrived between twelve and one o'clock of the same day; that the defendant stopped and bated, and again started on his journey between one and two o'clock. The defendant drove from St. Albans to Richmond the same

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afternoon, where he arrived early in the evening; that the distance between St. Albans and Richmond, where the defendant put up for the night, is between thirty two and thirty four miles; that the defendant started from Richmond the next morning, and proceeded as far as Montpelier; when the horse was first noticed to begin to falter; that the defendant after stopping a short time, proceeded again on his journey, and arrived at Topsham that evening; that the horse continued to grow worse from Montpelier to the end of the journey; and, for the last few miles, it was with difficulty, that the horse could be made to travel; that after the defendant arrived at Topsham, which was at night, of the second day, the horse continued to languish until he died. It also appeared, when the defendant arrived at St. Albans village the horse was somewhat warm and sweatty; and, while the horse was in that condition, the defendant ordered oats to be given to said horse, which was done. It was also proved, that the weather was very warm. The journey was performed in a rather heavy one horse waggon, owned by the defendant, which was occasionally used for two horses. The horse drew the defendant, his wife and their baggage on the journey. It appeared, that the horse, at the time the defendant took him from the plaintiff, was apparently sound and in good health. It was also sworn, that the road between St. Albans and Richmond was very rough and the travelling rendered slow and difficult, occasioned by a heavy rain in the month of August before, which cut up the roads and carried off many of the bridges. The plaintiff having submitted the case, and the defendant declinind to introduce any evidence, and the Court having thereupon intimated an opinion, that the plaintiff had not made out a *prima facie* case, the plaintiff offered testimony tending to prove unskillful, and improper treatment of the horse at Topsham, in administering medicine for the purpose of curing the horse, which was rejected as being offered too late.

The plaintiff then insisted, and so requested the Court to charge the jury, that from the following facts, they were at liberty to infer, that the death of said horse was occasioned by the immoderate use and driving of said horse by the defendant.

The Court charged the jury in substance, that, to entitle the plaintiff to recover, it was necessary for him to shew some improper usage of the horse by the defendant, and to satisfy the jury, that the loss of the horse was owing to such ill usage. That in the absence of any direct evidence, the jury were at liberty to infer the loss of the horse from the circumstances of the journey; but, as no evidence was offered shewing the nature of the ailment or disease, which occasioned the death of the horse, it was for them to determine, whether, considering the distance performed, and the time taken for that purpose, the driving was so unusual and immoderate as to create a fair presumption, that the death of the horse was occasioned thereby. If they considered the affirmative to be true, they would find for the plaintiff, but unless they were of opinion, that the performance of the journey was such, as would create, of itself, a presumption, that it occasioned the death of the horse, they would find for the defendant. Whereupon the jury returned a verdict for the defendant. To which decision and charge of the Court the plaintiff excepts, and his exceptions are allowed.

Argument for the plaintiff.—1st. The plaintiff contends, that the parties are entitled to a trial by a jury. They are the sole judges of the facts; and the duty of the Court is to instruct the jury how to apply the law arising in the case, to the facts before them, and leave them to determine the cause.

In this case, though the Court did not take the case from the jury; yet they gave an opinion, that there was no evidence for them to weigh, which was in fact deciding the cause, unless the jury wholly disregarded the opinion of the Court.

2d. It is presumed, that the opinion, intimated by the Court, had great weight with the jury. And, if that opinion was erroneous, the plaintiff is entitled to another trial, as much as though the Court had stopped the cause and directed a verdict.

If the Court believed, the plaintiff had not made a *prima facie* case, they should have directed a nonsuit.

3d. The plaintiff rested his cause, at a point where the

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Court were of opinion, he had not made a case for the jury: and, when the plaintiff offered further evidence, the Court decided, that evidence offered came too late. This decision precluded any further testimony, or further offers of testimony in this case. The question then is not as to the character of the testimony offered, but whether any should have been received after the plaintiff said he rested his cause.

4th. The Court charged the jury, that there was no evidence tending to show the ailment of the horse; they had nothing to infer the cause of the death from, but the evidence relating to the driving, when, had the Court permitted the plaintiff to have come to the jury with his evidence, the real cause of his death would have been apparent; and might have satisfied the jury, that hard usage was the real cause of the death of the horse.

5th. The Court, in their charge, misdirected the jury, by telling them, that they were to infer the injury from the distance performed and the time taken to perform it; when the Court ought to have directed their attention to the other facts in the case.

Argument for the defendant.—The County Court was correct in refusing to receive evidence to prove, that the defendant was unskilful in administering medicine to the horse, on two grounds.

1st. After the plaintiff had closed his case, the Court were correct in refusing to permit him to introduce further testimony. This has been the uniform practice of the Court, and is well understood by the bar. If a different rule is to prevail, neither Court nor Bar will ever know when a case is to be submitted to the jury.

2d. It will be perceived, by an examination of the declaration, that the gist of the action is, the unreasonable and improper driving of the horse, by means of which he died. The plaintiff has not, in his declaration, complained of the defendant's want of skill in curing or doctoring. Therefore, the evidence offered is objectionable on the ground of variance. The proof offered must correspond substantially with the facts alleged in the declaration.

If the charge of the Court was incorrect, it is to be at-

tributed io the request of the plaintiff, as the Court in their charge adopted precisely the principles contended for by him.

HUTCHINSON, C. J.—The plaintiff complains of being injured on the trial of this action, by a premature expression of an opinion upon the weight of evidence, by the Court, and by the Court's refusing to hear further ovidence when offered by him: and also by the instruction given the jury.

The two first points must rest so much in the discretion of the Court, that to grant a new trial on account of them, would be an innovation in our practice. And yet, we are not in the habit of expressing any opinion upon the weight of evidence. If there is none at all for the Jury to weigh, it is useless to trouble the jury with the cause. If there is any evidence upon the issue, we usually leave it to the jury without comment upon its weight. The meaning of the Court in this case, probably, was, that there was no evidence, tending to fix any blame upon the defendant.—Therefore no *prima facie* case was made out. This would clearly be correct in principle. I am inclined to the opinion, that there was some evidence, proper for the jury to weigh, as will be noticed when considering the instructions to the jury. And the Court did not take the case from the jury, but permitted it to go on to a verdict. It is true, it went under rather unfavorable circumstances, after such an intimation from the Court; especially as such intimations are not frequent, in our Courts, unless when the plaintiff's testimony is excluded altogether.

It seems, the plaintiff offered further testimony, which was excluded by reason of its coming too late. There might be other reasons, perhaps. For that which was offered was not very direct proof of the declaration. And the plaintiff ought not to complain of a correct decision, although the reason given should not be conclusive. Nor can we anticipate what other testimony the plaintiff would have offered, or whether any at all, if the Court had not decided that he was too late in his offer. If he had offered evidence clearly pertinent to the issue, probably it would have been received, late as it was. We pass to notice the instructions given to the jury. There is but one

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part of these instructions that are at all exceptionable; that is where the grounds of enquiry and decision are limited to time and distance, while other considerations should not be excluded. The jury were directed, "to determine, whether, considering the distance performed and the time taken for that purpose, the driving was so unusual and immoderate as to create a fair presumption that the death of the horse was occasioned thereby." They should have been instructed also to take into consideration the degree of heat then prevailing, the roughness or smoothness of the road, the weight of the waggon, the load in the waggon, the time when the horse began to fail, how much he was used afterwards, whether the symptoms of failure were such, as would render it imprudent and dangerous, to use him at all, and how long before he died, after the journey was ended. For want of the Court's allowing the jury this enlarged view of circumstances, in deciding what killed the horse, the judgement of the County Court is reversed, and a new trial is granted.

Harrington & Hector Adams, for plaintiff.
Smalley & Adams, for defendant.

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REUBEN PIKE *vs.* JOSEPH M. MOTT.

If a note be payable in cattle, at the Maker's house on a day certain, and the Payee of the note calls at the time and place for the cattle, which are not turned out; and at the request of the Maker, the Payee agrees to call another day, and take the cattle, and soon after the Payee does call, makes known his business, but the Maker is not at home to pay the cattle. The Payee then sees the Maker and informs him, that he called for the cattle according to his agreement.—Decided that after this information, it was the duty of the maker to pay the cattle immediately. That the Payee was not obliged to call again for the cattle. That the Maker might appoint the time of payment at his house, and notify the Payee; and payment or tender, made at such time, and place, would be good. That as the Maker neglected for three months to make payment, or tender of the cattle, it was an unreasonable delay on his part, and a cause of action had accrued on the note. That the Payee, in declaring on the Note, need not notice the agreement to prolong the time of payment; and if the Maker relies on such agreement, he must plead it specially.

This was an action of assumpsit on a promisory note dated October 28, 1829, for the sum of $24,50, payable in neat cattle, delivered at the defendant's dwelling house, in Alburgh, on the first day of October, A. D. 1830. Plea

non assumpsit. On trial of the issue by the jury, the defendant after admitting the execution of the note, proved that on the day when the note became payable, to wit, the 1st day of October, 1830, the parties being together, the defendant stated to the plaintiff that he had the cattle ready and would turn them out on the note if the plaintiff insisted, but suggested that he had other business to attend to, and requested the plaintiff to defer the payment of the note; that the plaintiff with a view to accomodate the defendant agreed to defer the payment, and stated that if it would make any difference with the defendant, he would call another day and take the cattle, and that in consequence of this understanding the parties separated and the cattle were not turned out. This being proved the plaintiff introduced a witness who testified, that, a few days afterwards he went with the plaintiff at his request to the house of the defendant for the purpose of demanding the cattle on the note—that the defendant was not at home, and they saw no body but the defendant's brother, of whom they enquired for the cattle on the note—that the defendant's brother replied that he knew nothing of any cattle being there for the plaintiff—that he had no charge of defendant's business, and, no authority to act for him. The plaintiff also offered evidence tending to shew that the defendant was then attending Court at Grand Isle, and that afterwards, and during the term of the Court the plaintiff stated to the defendant at Court that he had been to defendant's house as stated above after the cattle. Upon this shewing the Court decided that the plaintiff was not entitled to recover in this action by reason of the non delivery of the cattle on the first of October, as the plaintiff had waived his right to have them on that day; and that no sufficient demand was shewn to have been subsequently made to sustain the action; therefore the plaintiff submitted to become nonsuit with leave to except to the aforesaid decision.—The exception being allowed, the case now comes here for decision.

BAYLIES, J.—The plaintiff held a promisory note against the defendant, dated 28th October, 1829, for the sum of $24,50, payable in neat cattle, at the defendant's dwelling

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house in Alburg on the first day of October, 1830. At the time and place of payment, the plaintiff was ready to receive the cattle; but at the request of the defendant "the plaintiff agreed to defer the payment," and said, "*he would call another day, and take the cattle.*" The case shows, that in a few days after, *the plaintiff called at the defendant's house to take the cattle on said note*, and there made known his business; but the defendant was not at home to turn out the cattle; he was at Court on Grand Isle, where the plaintiff saw him, and told him he had been to his house to take the cattle on the note, as he had agreed. After the plaintiff gave this information, it was the duty of the defendant to pay the cattle forthwith on the note. If the plaintiff did not call again to take the cattle, and he was not obliged to, the defendant might appoint the time, when he would pay the cattle at his house on the note, and notify the plaintiff of the appointment, and pay accordingly. After such appointment and notice, the payment of the cattle at such time and place would be as good, as if made at the time, and place mentioned in the note. But if the plaintiff did not attend at the time and place, so that payment could be made to him, then a tender of the cattle at the uttermost convenient time on that day would be good. 1 Swifts Dig. 293; Inst. 211.

So, if the defendant chose, he might have driven his cattle to the plaintiff's house, and if he was at home, there paid, or tendered the cattle on the note. But the defendant adopted no mode of payment, and made no exertion to satisfy the note before he was sued in January, three months after the note became due. We consider this was an unreasonable delay of the defendant to pay the note; and that a cause of action had accrued to the plaintiff on the note before he commenced this suit.

But it was contended before the County Court, and it is insisted here, that inasmuch as the plaintiff had declared on his note in the usual way without noticing the agreement to prolong the time of payment; the plaintiff cannot recover. We consider, that if the time of payment, mentioned in any written contract, not under seal, is enlarged by agreement of the parties; in bringing an action on such contract, it is sufficient to declare, that the payment

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was not made according to the time mentioned in the contract, without noticing the agreement to enlarge the time of payment; and if payment was in fact made according to the enlarged time, the defendant may show it, by pleading specially, the agreement to enlarge the time of payment, and payment accordingly. In the case at bar, we consider the action was rightly brought on the note, and if the defendant had any sufficient excuse for not paying the note according to its tenor, this shewing should come from him, and not from the plaintiff. 1 Swifts Dig, 288; 2 Day, 408; 15 J. R. 338.

If the contract in the case had been a specialty it might deserve a different consideration. 3 Ter. Rep. 590 & *n*.

A majority of the Court are of opinion that the nonsuit should be set aside; and a new trial granted, and it is ordered accordingly.

Harrington & Perrigo, for plaintiff.

Brown & Bascom & Hazen, for defendant.

SAMUEL MOTT *vs.* JOSEPH I. MOTT.

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In an action brought by a plaintiff against two or more defendants, if the writ is not served on all, but a non est is returned as to some, those defendants on whom service is made may avail themselves of any defence which all the defendants could make if the writ had been served on all.

The defendant on whom the writ is served may plead in offset any sum proper to be plead in offset due from the plaintiff to all the defendants against whom the writ is issued.

A judgement may be rendered in the name of the defendant who appears for any balance which may be found due from the plaintiff to the defendants against whom the writ issued.

This was an action of debt on judgement pending in the County Court. The writ was issued against the defendant and one John Mott, but the officer returned a non est inventus as to the latter. The plaintiff counted in his declaration upon a judgement in his favor against defendant and said John Mott. Defendant appeared and plead 1st. Nul Tiel. Record. 2d. A plea in offset, that the plaintiff was indebted to him and said John Mott in a larger amount than now claimed by the plaintiff. To this last plea in offset the plaintiff demurred. The first issue

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having been found for the plaintiff, the Court upon hearing the demurrer adjudged the plea in offset to be insufficient, and gave judgement for his debt. To this decision the defendant excepted. The exception being allowed, the case now comes before this Court for further adjudication.

Argument for plaintiff.—The only question presented in this case, is, whether the defendant can set off a joint demand in favor of himself and one John Mott in this suit, against the plaintiff's demand.

It is contended that in all cases where a set off is allowed, of demands in favor or against parties, diffcrent from those upon the record, it must be in cases where the parties upon this record are the only ones in interest, and where it plainly appears that the set off can effect the right of none but the parties of record. D. Chipmans Rep. *Breckenridge* vs. *Whitcomb*, 180.

In this case John Mott is not privy to the record, and the Court cannot seaver the interest of the defendant from that of John Mott, without his consent. For the demand being joint, the Court cannot judge what interest each may have in it. It may or it may not be, that their interests are equal. A joint demand by no means implies that the interest in each are equal.

It is contended that this entire demand cannot be set off; for if set off to the amount of $100, then clearly, the plaintiff might plead his offset to the defendants offset to the amount of 1000 dollars in his favor against the defendant and John Mott or even John Mott alone, and recover his judgement for the balance; or the plaintiff might plead his book account in offset to the defendant's offset in his favor against S. & J. Mott, or even against John Mott alone, and balance book accounts with John Mott without his knowledge or consent, and bring him much in debt. *Meader* vs *Leslie*, 2 Vt. Rep. 569.

Demands to be legal offsetts must be mutual; but in this case, the debts are neither mutual by parties nor by interest, and cannot be offset, See Statute p. 85, Sec. 92.

The Counsel for the defendant contended, 1st. That in offsets the Court always regard the mutuality of the claims.

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The claims in this case are mutual in as much as the demands are in fact between the same parties.

The original claims between these parties were joint and could have been offset; the severance is by operation of law, and this ought not to effect the legal rights of the parties. It effects none of the legal rights of the plaintiff and should not those of the defendant.

The defendant and John Mott are parties to the record. The writ is against both; both are set up in the declaration, and the plaintiff has declared against both. The suit was commenced against Joseph S. & John Mott, on a joint demand against them, and the rules of pleading would be the same in all respects as though the writ had been served upon both.

The demand of the plaintiff was a joint and not a joint and several demand. The judgement would it is contended bind both defendants. The defendant who was nonsuited could not, if sued himself set up and try over again a defence which had been made by the party in this suit.

The opinion of the Court was pronounced by

WILLIAMS, J.—This action was commenced against Joseph S. Mott & John Mott, as appears both by the writ and declaration. The Sheriff returned that he could neither find body nor estate of the said John Mott within his precinct. According to the practice in this State the suit then proceeded against Joseph S. Mott alone, who appeared and plead in offset to the plaintiff's demand, that the plaintiff was indebted to him and the said John, who was originally sued with him, in a greater amount than the plaintiff here claimed. It appears that the plaintiff counts in his declaration on a joint demand against the said Joseph & John Mott. The question is whether, as the suit now stands against Joseph S. alone, he can avail himself in offset of a sum due to him and John Mott. It is contended that as he stands as sole defendant, there is no mutuality in the claims which are attempted to be set off one against the other; that as the statute provides, that when a balance is found due to either party, judgement shall be rendered therefor against the party in arrear, the defendant can only plead in offset a sum due to him alone and

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cannot take a judgement in his own name for a sum which may be found due to him and another.

The objections as it will be seen are technical, and as such they present some formidable objections against the plea. If it shall be found however that both upon a legal and equitable construction of the statute the defendant is entitled to this defence, we must endeavor to overcome any difficulties arising from forms, and give effect to the spirit and intent of the statute.

The statute of offsets provides that where the plaintiff in any action &c. shall be indebted to the defendant, the defendant may plead an offset of any sum or sums due to him from the plaintiff, which plea shall be in the nature of a declaration in one or more counts, and the jury shall be directed to find generally such sum or sums as shall be found in arrear from either, and judgement shall be rendered thereon accordingly. To give effect to this statute we think that those persons may be considered as defendants against whom the writ and declaration issue. That as the writ issued in this case against Joseph & John Mott on a joint demand against them, they are to be treated as defendants, and any defence whether by plea in offset or otherwise which destroys the plaintiff's action and shews that he has no right of action against the two, will avail either of them if the suit becomes discontinued as to the other in consequence of a failure to make service on both. The plaintiff would have been permitted in this case to have given in evidence an acknowledgement of John Mott to avoid the statute of limitations if the same had been plead, or any admissions or declarations of his in relation to the joint demand. Whether the defendant Joseph S. could also have plead in offset a sum due him alone from the plaintiff is not a question now before us, and we only remark that if the defendant has this double advantage it must arise from the peculiar situation of the case.

As it appears from the pleadings, that at the time of the commencement of this action the plaintiff was indebted to Joseph and John Mott in a greater amount than the claim he sets up against them, his action must be barred and he is not entitled to a judgement against both or either of them, and this must have been anticipated by him at

the commencement of the suit, if he had no defence against their claim.

The question then arises whether a judgement for the balance which appears to be due from the plaintiff to Joseph S. & John Mott can be rendered in this case, as John Mott is not before the Court and is not now a party to this suit; and we are inclined to the opinion that a judgement may be rendered for this balance in the name of Joseph S. the only defendant who appears; that in order to carry the provisions of the statute into effect in a case situated like this, judgement must be so rendered.— The effect of such judgement, will be, to preclude any other action on the demand which is the subject of the plea, in the name of Joseph S. and John Mott. The demand due from the plaintiff was due to them jointly, either could have controlled it, could have commenced an action thereon in the name of both, either could have received payment, released or receipted the whole demand, accounting to the other for his share.

The legal and equitable powers of this Court are sufficient to guard the rights and protect the interest of John Mott if there are any considerations to induce us to exercise them on his application, but judgement must be rendered in the name of the defendant, who here appears for the balance due him and John Mott, from the plaintiff.

The judgement of the County Court must therefore be reversed and judgement entered for the defendant to recover the balance due, and as it is a matter of computation only, the clerk will ascertain the balance and enter a judgement therefor.

After the opinion of the Court was pronounced, the plaintiff, by leave of the Court, entered a nonsuit, the defendant making no objection.

Harrington, for plaintiff.

Brown, for defendant.

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ABRAHAM HILLIKER *vs.* SYLVIA LOOP.

The non joinder of one who ought to have been made a plaintiff may be taken advantage of on trial, notwithstanding it may be pleaded in abatement.

It is competent for the parties in an action on book to testify as to the persons who owned and sold the articles charged.

Plea of partnership between the plaintiff and another person and judgement thereon, does not estop the party from insisting that there was a partnership between the plaintiff and two others.

In the case of dormant partners an action may be brought on an implied contract made with them, either in the name of the acting partner alone, or in the name of all the partners; but if in the name of the latter the Court will see that the defendant is not deprived of any defence which he would be entitled to, if the action had been brought in the name of the acting partner alone.

In the case of joint owners of property sold by one, the purchaser not knowing that others were interested, an action for the price may be maintained in the name of the person with whom the contract was made, or in the names of the persons interested.

This was an action on Book which seems to have been pending in the County Court. The defendant plead in abatement, stating, that at the time of the delivery of the article charged, the plaintiff, and one Joseph Tilitson were partners and joint owners of the same, and that the property was delivered to the defendant as their joint property, and not on the private account of the plaintiff. The plaintiff replied, traversing the facts stated in the defendant's plea. It would seem from an inspection of the papers that the plea in abatement did not prevail, and that a judgement to account was rendered. By the report of the auditor the following were the material facts which appeared.

That some time previous to September, 1830, the plaintiff agreed with the defendant to furnish and deliver at the grave-yard in Alburgh a set of Grave Stones, which were to be lettered agreeable to a certain inscription furnished by the defendant, and the defendant agreed to pay the plaintiff $27 for the same. The plaintiff delivered the Grave Stones agreeably to the contract.

The defendant then offered to prove that the plaintiff at the time he sold and delivered the Grave Stones aforesaid, was a partner in that business with Joseph Tilitson and Joel Tilitson of Highgate, who are now living—or if not actually partners, yet that the Tilitsons were joint owners of the property aforesaid, with the plaintiff, and that it was

sold on their joint account; and for that purpose called the plaintiff, who had not been sworn in the cause. To this the plaintiff's counsel objected, and contended that the defendant could not at this time avail herself of this defence; and if this defence did not come too late, yet that the plaintiff could not be called by the defendant, and made a witness to prove the aforesaid fact offered to be proved by the defendant. But the auditor overruled both these objections and the plaintiff was sworn.

From the testimony of the plaintiff, it appeared, that sometime previous to September, 1830 the plaintiff and J. & J. Tilitson, who were general partners in Marble business, and still being, entered into a contract by which it was agreed, that the Tilitsons were to furnish Grave Stones for the plaintiff, to be by him polished—that the plaintiff was to carve and letter them, with such inscriptions as should be furnished by the purchaser—that the plaintiff was to sell the Grave Stones, was to collect in all the pay for the Grave Stones so sold, and to pay over to the Tilitsons one half of all that was received for them; and if any debts were lost, the Tilitsons were to loose one half, and the plaintiff the other half. Nothing was said at the time of making this contract whether the Tilitsons should or should not have a right to collect or recover pay for Grave Stones sold by the plaintiff. The plaintiff sold all the Grave Stones received of the Tilitsons in his own name, and never made any contracts as partner of the Tilitsons, or signed any obligations as such. The Grave Stones in question were received of the Tilitsons under the contract made with them by the plaintiff as aforesaid.

Upon this state of facts the Auditor found for the plaintiff to recover the sum of $27, for said Grave Stones, and interest.

To the acceptance of the report, the defendant objected. 1st. That the action of Book Account cannot lie. 2d. That the plaintiff was a partner with J. & J. Tilitsons in the sale of the property. 3d. The plaintiff and said Tilitsons were jointly interested in the plaintiff's account. These objections prevailed with the County Court. Whereupon the plaintiff excepted to their decision, and the case is now presented for the consideration of this Court.

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Counsel for plt'ff.—1st. It is contended that plaintiff and Tilitsons were not partners in the Grave Stones, for which this suit is brought, nor could they have maintained this suit as such; for to constitute a partnership there must be a joint interest both in the purchase and sale of the partnership effects. Wilsons Partnership 20 & 21; 1 Swift. Dig. 340; 4 Term. Rep. 720, *Savilla* vs. *Robinson & Hutchinson.*

Hilliker could not legally be made chargeable with the labor in quarrying the marble, nor for the use of Mill to saw it, nor for transporting the marble, nor any other expense until the marble had actually passed into his hands. And on the other hand Tilitsons could not legally be made chargeable for any polishing, lettering nor carving, nor for transporting the Grave Stones to the place of sale.

By the terms of the agreement between Hilliker & Tilitsons, Tilitsons could have no control over the Grave Stones after they passed into the hands of Hilliker; nor could they dictate the price, the terms or time of payment, for this was wholly in the power of the plaintiff. But in exchange for this privation the Tilitsons were to be shielded from troubles and dangers that otherwise they must have shared, viz. collecting in the debts, paying expenses in endeavoring to enforce a legal collection, which they must if joined in the collection have shared. There were such stipulations in this agreement as excludes all idea of partnership. There was no equality in the loss and gain as between the plaintiff and the Tilitsons. Had there been a privity between the defendant and the Tilitsons in making the contract, it would alter the appearance of this defence. But the contract was made without the defendant's knowledge that the Tilitsons were in any way interested in it.

2d. If the Tilitsons could be called partners at all, still they are dormant partners; for in the words of the Report "the plaintiff sold all the Grave Stones received of the Tilitsons in his own name, and never made any contract as partner of the Tilitsons, or signed any obligations as such." And the Report shows that the contract was made solely between the plaintiff and the defendant, without any reference to the Tilitsons. This, if partners at all, would make the Tilitsons dormant partners; and the law is that

he who conceals his name while he is partner shall not come out in the collection of the debts. It would operate to effect offsets and surprise the other party, and has never been allowed. This has been expressly decided in the case of *Boardman* vs. *Keeler & Allen*, 2 Vt. Rep. 65; 1 Swifts Dig. 348.

3d. The record in this case, shows that the defendant pleaded the nonjoinder of the Tilitsons in abatement before the County Court, and the plaintiff pleaded a replication traversing that plea, so that an issue was joined; and by a fair interpretation of the records below, this was the issue on which the Court gave judgement to account. If so, the defendant should have excepted to that judgement and in that manner brought the question to this Court.

The pleadings were all made and judgement rendered the same term of the Court, and it is contended that the defendant could not waive the pleadings without an order of the Court, and a repleader awarded; and if the defendant disregarded the pleadings and issue, and suffered judgement to pass, the same question could not be raised by the defendant before the auditor. By the rules of the County Court, if either party party changes his pleadings he must file his plea and serve the adverse party with a copy 30 days before the session of the Court in which the cause is to be tried.

4th. The plaintiff could not be called as a witness by the defendant to prove the contract between himself and Tilitsons. This does not come within the statute authorising the examinations of parties in book actions.

Counsel for defendant.—In all cases of implied contracts the legal interest in the contract is vested in the person from whom the consideration moves. Hammond on Parties, 6, 11, 20; Goulds Plead. 196; *Teed* vs. *Elworthy*, 14 East. 210; 3 Espinas R. 248.

All persons legally interested in the contract must be joined in the action. Gould P. 272, 4; 1 Saund. 291; *Rice* vs. *Shute*, 5 Bur. 2611; *Dubois* vs. *Luderts*, 1 C. L. R. 207; Law. Plead. 108, 9, 309; *Scott* vs. *Goodwin*, 1 B. & P. 67, 73.

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ed, and judgement must be entered for the plaintiff to recover the sum found due by the auditor.

Harrington, for plaintiff.

Smalley & Adams, for defendant.

CHARLES W. CLARK *vs.* JEDEDIAH FREEMAN.

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That an Audita Querela must be served upon all who are named as defendants, or it may be abated.

That one, who is named as defendant in an Audita Querela, and on whom no service is made, cannot be bound to answer by having notice of the suit; the statute provision about giving notice applying only to cases where service has been made.

That when service of a writ of Audita Querela is made upon one only of two defendants, and he neglects to plead in abatement, but goes to trial upon the merits, and there is a verdict against him, with nominal damages and cost, it is then too late for him to move to dismiss the suit for want of service on the other defendant; but the Court will proceed and render judgment, that the execution be set aside, with nominal damages and cost; leaving the original judgment in full force.

This cause came up from the County Court for a hearing upon a Bill of exceptions, from which it appears that this was an *Audita Querela* brought against the aforesaid Freeman, and one James Dougery, to set aside an Execution in their favor against the said Clark. The writ was legally served on Freeman and *non est* was returned as to Dougery. At the September Term of the County Court 1830, said Dougery, after the plaintiff had proved notice on him, appeared and made a written motion to dismiss the action as to him; upon this motion the Court rendered judgment, that Dougery be dismissed with his costs.

At a subsequent Term the cause came on for trial against Freeman, on the plea of not guilty. On this plea judgment was rendered against Freeman, for one cent damages. After judgment, Freeman moved, that the action be dismissed as to him, on the ground, that, after the dismissal of Dougery, no further proceedings ought to be had in the case. This motion was over ruled, and judgment rendered against Freeman. To both decisions exceptions were taken, and now come here for consideration.

Smalley and Adams, for defendant.—Contended that the precise point, involved in this case, was determined in the

case of Prop. Society is Ballard 4 Vt. R. 119. Compile Stat. 64, 74, 61, 101, 87, 328.

The abatement of the suit as to either of the defendants is an abatement as to both. All proceedings in the cause became nugatory and absurd on the severance of the parties. By dismissing Dougery from the *Audita Querela*, it follows, that he may rightfully detain the plaintiff on the execution, whilst Freeman, by the last judgment of the County Court, is condemned to pay damages for this detention. Dougery's rights are affected without his having an opportunity of protecting them.

All the defects of service in this case appear from the face of the writ; and therefore, it was unnecessary to plead them.

Guild vs. Richardson 6, Pick 364, Casevs. Humphrey, 6, Con. R. 130, and authorities there cited.

Smith and Stephens, for plaintiff.—If Dougery is considered out of the cause, yet Freeman has no right to move to dismiss after a trial upon the merits. He should have pleaded in abatement, before the expense of a trial upon the merits.

HUTCHINSON, C. J.—A judgment having been recovered in favor of Dougery and Freeman, against the present plaintiff, Clark, this writ of Audita Querela, to set aside the execution upon that judgment, should clearly have been served upon both of said creditors; and for want of such service on both, it ought to abate or be dismissed, if a plea, or motion to that effect had been interposed in due time. The Statute has pointed out a way in which service can be made in all possible cases, to bring again into Court parties, who have once recovered judgments, for the purpose of correcting those judgments, if erroneous. But, if the action is entered in Court without service, notice of the suit, merely, will not make other persons, than those on whom service has been made, parties to the suit. The plaintiff proceeded just as if a service had been made on Dougery, and gave him notice of the suit. He might safely have disregarded that notice. But he, fearful, perhaps,

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of the consequence of standing aloof, appeared and filed a written motion to be dismissed from the suit. His motion prevailed. Had he appeared for the purpose of any other defence in the suit, than to move his dismissal, or to take advantage of the want of service in some way, it would have made him a regular party to the suit. But his appearance to move the dismissal did not bind him as a party.

Again, if Freeman would abate or dismiss the suit, it was incumbent on him to file his plea or motion in due season; and not plead to the merits, and put the plaintiff to the expense of a trial upon the merits, and afterwards move to dismiss the suit. By the judgment, rendered in the County Court, the execution is set aside, leaving the original judgment in full force, and the plaintiff recovered one cent damages and his cost; and that judgment is affirmed.

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HARRY HILL *vs.* DANIEL WAIT.

In an action, to give a justice of the peace exclusive jurisdiction, the *ad damnum* must not be laid over, nor the sum in demand appear from the declaration specification or exhibit of the plaintiff to be more, than ten dollars.

A judgment rendered on voluntary confession of the debtor, by a justice of the peace who is related to the creditor within the 4th degree of affinity, is void for want of jurisdiction.

Although an officer having an execution legal upon its face, issued on such judgment would be justified in levying and collecting the same, yet he is not liable for neglecting so to do.

This was a suit originally commenced before a justice of the peace, and was carried up to the County Court by an appeal entered by defendant.

It was an action against an officer for neglecting to serve and return an execution in favor of the plaintiff.—Plea not guilty. The declaration set forth a judgment upon which the execution was issued of $5,30 damages and 25 cents costs, and concluded to the damage of the plaintiff $20,00. At the May Term of the County Court 1830, the plaintiff moved to dismiss the cause on the ground of want of jurisdiction. This motion was overruled.

At the October Term 1830, upon trial of the cause, the

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defendant offered to prove that the judgment upon which the execution in question was issued, was rendered on confession before Ezra Pike, jr. who was related to the plaintiff within the 4th degree of affinity. To the admission of this evidence the plaintiff objected, which objection was overruled, and the evidence admitted.

The defendant then proved that said Pike was related to the plaintiff as aforesaid, and that this fact was known to the defendant when he had the execution in his hands.—Whereupon the Court decided that the judgment and execution were void, and therefore that defendant was not guilty. To this decision the plaintiff excepted, and this exception and also the question in relation to the jurisdiction of the Court below now come up here for consideration. The names of counsel, and the brief of the defendant have not been furnished by the judge who decided the case.

Plaintiff's Counsel.—1. The judgment mentioned in the plaintiff's declaration is not void.—*Stat.* 131.

Taking a confession is not a judicial act any more than taking the acknowledgement of a deed is a judicial proceeding. The magistrate in either case merely certifies an admission. By the words "any cause" in the 23d section of the act, p. 131, the legislature can mean nothing more than what in technical language is called "an action."—That is "the lawful demand of our rights" in a court of justice.

The effect which the law gives to a confession, cannot determine the nature of the act by which the confession is authenticated.

2. The justice had jurisdiction of the subject matter in this case. Besides the debtor has the right expressly given him by the 21st section of same act to tender a confession to any creditor before any justice; and the debtor thereby acquires certain rights without the consent or any act of the creditor.

The debtor in this case availed himself of this privilege and the defendant now seeks to avoid the voluntary act of the debtor after it has been accepted by the creditor. It must certainly be by some unbending rule of law, that the

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defendant can be permitted to set up this defence. What right or interest has he in the agreements of the plaintiff and his debtor.

3. The County Court erred in not dismissing the appeal. *Stat.* 140.

The sum demanded does not exceed ten dollars, though the *ad damnum* is twenty dollars. Where the declaration furnishes the rule of damages, the *ad damnum* is mere form. This action is against an officer for neglecting to *levy*, and making a *false return* upon an execution for the sum of $5,55. The thing or sum demanded is ascertained by the liability incurred by the officer for neglecting to levy this execution. This liability is measured by, and cannot exceed the amount of the execution.

PADDOCK, J.—Two questions are presented by these exceptions for the consideration of the Court. 1. Whether the County Court had appellate jurisdiction; or in other words, whether the writ was so drawn as to give the justice of the peace exclusive jurisdiction. The declaration sets forth a judgment of $5,30 damage and 25 cents costs, and concludes "to the damage of the plaintiff $20,00." The question has long been agitated in the lower Courts whether the *ad damnum* or the cause of action declared on should be the criterion in determining the jurisdiction of a justice of the peace; and the practice is very unsettled, particularly in cases where their adjudication is final; and the decision of our County Courts have not been uniform in sustaining appeals of that character; but in some cases have been governed by the amount of the plaintiff's demand, and in others by the amount of the *ad damnum*; and it is of little consequence which shall be adopted, compared with the necessity of having the question put at rest. In the case of *Church* vs. *Van Duzer* decided last week in Franklin county, the plaintiff in an action of book debt, had laid his *ad damnum* at $10 and the amount which he exhibited before the justice amounted to $10,60; an appeal was taken to the County Court, and a motion to dismiss for want of appellate jurisdiction was overruled, and this Court affirmed the judgment. Again, in the case of *Reynolds and Wife* vs. *Robinson*, decided on writ of error in Franklin

County 1822, the *ad damnum* was $20, the amount *on oyer* was $1,50, the County Court on motion, dismissed the action for want appellate jurisdiction,and this Court reversed their decision; and it would seem that the point to be decided in this case, falls directly within the decision last cited; for where the Court has the question of jurisdiction before them, it is immaterial whether the amount of damage is to appear from the declaration or a specification of the claim; and as the case of *Reynolds and Wife* vs. *Robinson*, the defendant in error, must be considered as settling the law where the *ad damnum* is laid over $10; so does the case of *Church* vs. *Van Duzer*, where the amount exhibited is over $10,and both were appealable. And the Court are unanimous in the opinion, that to give the justice exclusive jurisdiction, the *ad damnum* must not be laid over, nor the sum in demand appear from the declaration, or specification or exhibits of the plaintiff, to be more than $10.

The jurisdiction of the justice being sustained, our next enquiry is, whether Ezra Pike could legally render a judgment in favor of this plaintiff; they being related within the 4th degree of affinity. In the 23d section of the act defining the powers of a justice of the peace, it is declared "that no justice of the peace shall take cognizance of any cause, where he shall be within the 1st, 2d, 3d, or 4th, degree of affinity or consanguinity to either of the parties, or shall be directly or indirectly interested in the cause or matter to be determined." And in the case of *Bates* vs. *Thompson*, *reported in 2d, Vol. Chip. R.* 96, it was determined by the Court, that the entering up of a judgment by a justice of the peace, upon the voluntary confession of the debtor, was *taking cognizance of a cause*, within the meaning of this section; and as the justice was the owner of the demand upon which he took the confession, the record was adjudged void; and we see no reason for calling in question the propriety of that decision; therefore the judgment against Pettis upon which the execution in question issued, must be pronounced void.

As it respects the execution, it being legal upon the face of it, would have justified the officer had he levied and collected the amount of Pettis; and yet the plaintiff cannot recover of him in a charge of neglect of duty in not col-

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lecting and paying the amount over; for in this as well as in other cases, to make an officer liable for neglecting to collect an execution the plaintiff must show a judgment that is not void. For these reasons, the judgment of the County Court must be affirmed.

Judgment affirmed.

HUTCHINSON, C. J. *dissented*.—I am not fully satisfied, that the decision now made, pursues the principle we have adopted in some other cases. Allusion is made to the case of *Robertson & Wife*, before this Court several years ago. I fully approve of that decision, as it is stated. It is said the plaintiff, in his action on book before a Justice of the Peace, laid his *ad damnum* at twenty dollars; but exhibited an account of only one or two dollars. He recovered, and the defendant appealed; and the plaintiff moved to dismiss the appeal, because the action was not appealable. The Supreme Court correctly decided, that this motion of the plaintiff should not prevail; because he had brought such an action, that, for ought appearing in his declaration, he might prove himself entitled to recover twenty dollars; and his offering evidence to prove less than ten dollars, when he might or might not have more in his power, should not deprive the defendant of his right of appeal. In the case before us, the *ad damnum* is twenty dollars, but the cause of action, particularly described, shows that the plaintiff can not be entitled to recover any more than five dollars and fifty five cents, being the amount of the execution delivered to the defendant, to collect, adding interest upon that sum for a short time. There is no allegation of any special damage resulting from the defendant's neglect. It is not easy to conceive of any damage that could exist beyond the loss of the debt; but if any existed, it could not be recovered without a special allegation. In an action of trover for converting a five dollar Bill, the measure of damages would be no more fixed and certain at five dollars and the interest, than they are in this case at five dollars and fifty five cents and the interest.—For this reason, I think the action was not appealable.—Where the cause of action, thus described, gives a rule for certain damages, the sum in the *ad damnum* may be consid-

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ered accidental and unimportant. We have just decided, at St. Albans, that an action was appealable, where the *ad damnum* was ten dollars only, yet the account exhibited in evidence exceeded that sum. So, in Baker *vs.* Blodget, where the action was not appealable in itself, it was decided to have become so by the plaintiffs plea in offset. In another case still, we have decided, that a fictitious offset should not render the action appealable. We may not yet have seen all the questions, that may be raised about the ten dollar jurisdiction of justices. But I fully agree with my brethren, that an appeal must be allowed, where the *ad damnum* exceeds ten dollars, and the case presented in the declaration, is one of uncertain damages, like trespass, or case for some wrong, where the damages must necessarily be uncertain; but not so where the sum is necessarily below ten dollars, as in the case now decided.

Willard Gordon *vs.* Reuben Clapp.

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That, in a suit on a Probate Bond for the benefit of a creditor, the breach assigned being the non payment of a dividend struck in the Probate Court, and on plea of payment, receipts, showing payment to the plaintiff by a former administrator, are admissible in evidence.

That the effect of these receipts as payment cannot be defeated by showing waste, committed by the former administrators.

That services performed, or money expended in aid of the defendant's administration, cannot be proved, in support of a suit upon his administration bond, nor to offset against the payments shewn by the above mentioned receipts; but are a claim against the defendant in his individual capacity.

This was an action of debt upon the administration bond of the defendant, as administrator *de bonis non* of the estate of Alexander Gordon deceased; Philo Berry and Polly Gordon having been the former administrators. It appears, by the declaration and pleadings and exceptions, that the defendant proceeded in the settlement of the estate, till he procured a dividend struck; and the plaintiff being a creditor of the deceased to the amount of $700, or more, and his dividend remaining unpaid, he procured this suit to be brought and assigned for breach the non payment of this dividend. The written pleadings were voluminous, ending in several issues to the jury; but a plea

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of payment, to which there was a traverse, is the only plea upon the trial of which any questions of law were saved. In proof of this plea three receipts were offered in evidence. These were objected to, but were admitted by the Court, and exception was taken to this decision.

These three receipts put together amount to the plaintiffs dividend except the sum of $1,57 The jury allowed the receipts, and returned a verdict for the plaintiff for the $1,57 only.

The receipts were similar in principal, not differing materially except in sums and dates. One of them is as follows, to wit:

Received, November 9th, 1802, of Philo Berry and Polly Gordon administrators to the estate of Alexander Gordon deceased, $148,00, which is to answer on an execution in favor of Willard Gordon against the said Alexander Gordon, and Samuel Davenport, and if the said Alexander Gordon's estate shall prove insolvent, and the sum which the said Willard has received amounts to a greater sum than the said Alexander's estate shall be adjudged by law to pay, then the said Willard promises, to refund and pay back to the said Alexander, all such sums of money as he has received, more than the estate will pay.

WILLARD GORDON.

Counsel for plaintiff.—Clapp has no interest whatever in the sum advanced or paid the plaintiff by Berry and Polly Gordon. If they paid out of their own funds there can be no pretence of interest in Clapp. If they paid out of the funds of A. Gordon's estate, in their hands, it was an administration of the funds, for the correctness of which Clapp is not responsible, and in which he has no interest.

1. There is no privity between the first administrator and the administrator *de bonis non*, and the latter cannot in any Court be made accountable for the acts of the former. *Grant* vs. *Chamberlain*, 4 Mass. 611; *Dale* vs. *Rosevelt*, 8 Cowen, 333.

2d. The administrator of an administrator must settle the account of his intestate in the Probate Court. *Norvel* vs. *Norvel*. 2 Greenleaf, 75; *Stone* vs. *Stores*, 6 Mass. 390.

3. This action is prosecuted by the plaintiff to compel

the payment of money, decreed to him by the Court of Probate. The decree was made on the defendant's rendering his administration account, and is founded on the money of his intestate's estate actually in his hands. How does he attempt to discharge himself from the performance of this decree? By showing that, 28 years before the passing of the decree, Berry and Polly Gordon, out of a fund in their hands for that purpose, paid the plaintiff a fraction of his claim against the estate of A. Gordon. The defendant requires the benefit of this payment to retain the effect in his hands to his own use. He asks to be discharged from the decree of 1830, directing him to pay a certain sum of money in his hands to the plaintiff, by virtue of the acts of Berry and Polly Gordon, done in 1802, though between him and Berry and Polly Gordon there is no privity, and no connexion whatever. Clapp gave bonds to abide the decrees of the Probate Court, and to pay out and distribute the effects of A. Gordon, which had or should come *to his hands*. He would discharge himself from this bond by effects, that come to *other hands*.

2d. Conceding for argument, that the defendant has succeeded to all the right which Berry and Polly Gordon had in the receipts, how is he aided by this right? The plaintiff's promise is to refund on a final settlement of the estate, should it then appear, that he had received more than his just portion of the effects of the intestate. If the defendant would avail himself of Berry and Polly Gordon's contracts, he must take them with all their conditions.—The point of settlement or no settlement of the estate was directly in issue by the pleadings—and all proof on this issue excluded by the Court. The plaintiff offered to prove, that Berry and Polly Gordon received and sold a large real and personal estate of A. Gordon, for which neither they nor their representatives had ever rendered any account; but the offer was rejected. The records of this Court furnish incontestible evidence of the mal-administration of Berry and Polly Gordon, and that this estate was thereby wasted and involved in endless litigation.

3d. The evidence offered to prove Clapp's agreement to apply the plaintiff's claim on him as administrator, in discharge of the receipts was clearly pertinent on the position assumed by the Court.

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Counsel for defendant.—The offer to show waste committed by Philo Berry and Polly Gordon was legally rejected, because, if proved, the effect would be to make the defendant responsible for their misconduct; and this too out of his own estate. As administrator, *de bonis non* he is answerable only for the estate which comes into his possession, belonging to Alexander Gordon; and the receipts, found among the papers of the estate, may be considered, with reference to this question, in the same light as if the defendant had found so much money. When the dividend was struck this money would have been added to the sums to be divided and the creditors would have it.—And it would be insufficient to permit the prosecutor to swallow it, by proof of waste in the first administrators, for whose misconduct the defendant would be in no manner liable. It would if allowed, transfer the liability of the bail of him, who committed waste, to the bail of him who had committed none.

The prosecutor has his remedy upon the bond of Berry and Polly Gordon, if he has lost any thing. He does not pretend that he is injured by the defendant.

If Gordon performed services, or advanced money to Clapp, in aid of the administration of the Estate, it becomes a claim against Clapp in his private individual capacity, the nonpayment of which furnishes ground for an action of assumpsit against him, but is no breach of the administration bond. That bond is conditioned for the faithful settlement of the Estate, not to pay third persons employed by the administrator to settle it.

The bond embraces the administration of all matters that existed at the death of the intestate, and came to the knowledge and possession of the defendant, and to nothing that transpired afterwards. Such is not the debt of the estate, which he and his bail are bound, by the condition of the bond, to pay.

HUTCHINSON, C. J.—The principal question, that is raised by the bill of exceptions allowed by the County Court is, whether the receipts, offered in evidence by the defendant, were correctly admitted by the Court on the plea of payment. There is no suggestion, but that receipts thus

given to this defendant, after the dividend was struck by his procurement, would be proper evidence upon his plea of payment. But these receipts were executed in the days of the original administrators of the estate of said Gordon; and were given by the plaintiff to said original administrators. It is urged from these circumstances, that the defendant can derive no benefit from them. And it seems to be supposed by the plaintiff's counsel, that the allowance of these receips to the defendant, would operate as a gift to him; or as they express it, he would pocket the money. We think this supposition not correct. It does not appear, whether the defendant exhibited these receipts before the Court of Probate to be treated as so much money, when the dividend was struck, or not; or whether he then knew of them, or has since discovered them. If he had them in his possession, it might not be prudent for him to take upon him the risk of their being genuine, and actually operating for his benefit as paymcnt, before the close of the controversy about them, which has since arisen. But if they are allowed him as payment in this case, he must account for them as so much money; and their amount may be a fund for another dividend.

Whether these receipts being evidence of payments and made by the former administrations, and not by the defendant, makes any difference about their being allowed as payment in this action, depends upon the nature of the whole transaction, including the character of the receipts themselves. The receipts contain incontrovertible evidence, that the plaintiff has long ago received two hundred and fifty-nine dollars towards such demands of his against the estate of said Alexander Gordon deceased, as he considered himself entitled to a dividend upon. Two of the receipts mention the demand as being against said Alexander Gordon, and one Samuel Davenport. This was alluded to in argument as possibly making a differencc. But it makes no difference. It was a demand against the estate of the deceased, and forms a part, at least, of the claim now sought to be recovered. This payment to the plaintiff was received by him of Philo Berry and Polly Gordon, as administrators of the said deceased. It was, therefore, paid out of the property of the deceased. It certain-

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ly must be so treated for every purpose, until their account of their administration is settled before the Court of Probate. By reason of this, so much less property of the deceased, in presumption of law, has come into the hands of the defendant to be administered, unless these receipts are to be treated as property; and if to be so treated in any way, it must be in the way attempted in this defence. Moreover, the very terms of these receipts point to the event of a dividend struck, and these to be treated as payment of such dividend, in whole or in part. One receipt contains this stipulation: "and if the said Alexander Gordon's estate shall prove insolvent, and the sum which the said Willard has received, amounts to a greater sum than said Alexander's estate shall be adjudged by law to pay, then the said Willard promises to refund and pay back to said administrators all such sums of money, as he has received more, than the estate will pay." Another of said receipts varies on this wise: "If I have received more than my dividend, then I promise to refund &c. all I have received more than the dividend allowed by law." If the plaintiff cannot be compelled to allow these receipts as payment of a dividend, neither could he be compelled to allow them in part payment of his debt, if the defendant had found property of the deceased sufficient to pay the whole claim, instead of a dividend, merely. Indeed, it is not easy to conceive of any other method of compelling the plaintiff to account for the amount of these receipts, half as plausible as the one now adopted.

These receipts being in possession of the defendant it must be presumed, that he received them from the former administrators, as he received any other evidences of property, and, probably, this delivery over to the defendant would be good accounting by the former administrators, in a suit against them or their bondmen, so far as the amount of these receipts, or the property paid to the plaintiff to procure these receipts.

The counsel have slightly glanced, in argument, at the evidence, offered by the plaintiff and excluded, of a large property wasted by said former administrators, belonging to said estate. This was not strenuously insisted upon; and there seems to be no ground for the argument. An

administrator *de bonis non* is only liable for the property of the deceased, which he actually receives, or might receive by using good diligence in search. He cannot be made liable for the property, wasted by the former administrators. He must make and exhibit an inventory of all the property he can find, just as if he were the original Administrator. I see no reason why he must not inventory all he can obtain from the original administrator. He assuredly must account for it in some way before the Court of Probate. See Stat. p. 340.

But, if any thing could be realized in any way from the waste, committed by the former administrators, it could not operate for the sole benefit of the plaintiff, but must be a fund for the proportionate benefit of all the creditors.

The exceptions show, that the plaintiff further offered to show his acting and expending money at the request of the defendant, and in aid of his administration. This was objected to and excluded. That this is a claim against the defendant as an individual, and not one, that can come in upon his administration bond, and be a charge upon his bail, is too plain to need comment, or illustration.

The judgement of the County Court is affirmed.

Smalley & Adams, for plaintiff.

Whittemore, for defendant.

CRITTENDEN, *December.* 1832.

SETH WETHERBY *vs.* TIMOTHY FOSTER.

That, in a suit against a Sheriff for neglect to levy upon personal estate such a defective setting forth of the articles and their value, as might be bad on demurrer, is cured by a verdict for the plaintiff.

That a Sheriff is liable for the official neglect of his deputy, but not for the performance of any unofficial contract, he may make.

That the setting forth a promise of the Deputy, to take property on an execution, does not vitiate, if the other allegations are sufficient to show a neglect to take property, exposed to the execution.

That the creditor's taking back an execution from an officer, so as to prevent his completing his duty, would discharge the officer from further liabilty But the taking back the Execution, after the officer is liable for neglect, and causing a partial collection of his debt, has no such effect. It operates in favor of the officer.

That it is no error for the Court to refuse to charge the Jury as requested, unless there is evidence to raise such law as is requested to be given in charge.

That Potash Kettles, set in arches in the usual way for use, are liable to be levied upon and sold as personal property, But, if it were not so, the defendant's taking them, and causing them to be sold on his own execution, precludes his pretending to excuse himself by saying they were real estate.

That it is the duty of the Court, to instruct the Jury upon all the points raised on trial. But it is too late to start new points, after the charge is through.

That the cash value of property, that might have been levied upon by an officer, is the rule of damages, and not an uncertain fluctuating auction price.

This was an action on the case for the neglect of the defendant, as Sheriff of Franklin County in the levy and return of an execution. The defendant plead not guilty; and there was a jury trial in the County Court; and exceptions were taken by the defendant, to several decisions, and Charge of the Court: all which appears in a bill of exceptions, too prolix to be inserted at length, but the prominent parts of which are recited in the arguments of counsel and the opinion of the Court.

The jury returned a verdict for the plaintiff, and judgement was thereon rendered.

The points, raised upon these exceptions, have now been argued before this Court.

Argument for defendant.—1st. It is contended that the declaration is insufficient, because there is no value alleged to the property, offered to be turned out.

2d. Because the claim is founded upon a promise of Campbell, the defendants deputy, which alone will support

assumpsit against him, and cannot be a cause of action against the Sheriff.

3d. Potash Kettles set in an arch are real estate—the Court should so charge.

4th. An officer cannot post and sell property, out of the life of an Execution.

5th. If the property, offered to be turned out, was not the property of the defendant in the execution, the officer was not obliged to take the property.

6th. An agreement of the deputy out of the line of his duty will not bind the Sheriff.

7th. It is never too late to request the Court to charge the jury, while the jury remain on their seats.

8th. The measure of damage should have been, what the property would have fetched at auction, not the actual value.

9th. If the plaintiff takes back his execution, and controlls it, the officer is exhonorated.

Argument for plaintiff.—The plaintiff contends, in answer to the several points, upon which the defendant requested the Court to charge the jury.

1st. That the simple fact of the plaintiff's taking back the execution from the officer, will not exhonorate the officer from a liability, which had already occurred; much less when the taking back of the execution was agreeable to the wish of the officer, and accompanied with a declaration on the part of the plaintiff; that he would hold the officer liable, as in this case.

2d. An offer on the part of the plaintiff to turn out property to the officer on an execution, with directions to post and sell it out of the life of the execution, will render the officer liable, for neglect to comply; especially, if, as in this case, the officer consented to take the property without any further act on the part of the plaintiff, and when the plaintiff and defendant's in the execution, and the officer all consented to such an arrangement. *Barnard* vs. *Stevens*, 2 Aik. R. 429; 1 Swifts Dig. 795; *Whipple* vs. *Foote*, 2 John. R. 418; 8 John. R. 20

3d. For *misfeasance* the deputy is liable as well as the Sheriff. But for *nonfeasance* the Sheriff only is liable. 1

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Aik. R. 258; 2 Aik. R. 299. Hence it must of necessity follow, that, if the other points are decided in favor of the plaintiff, this also must be; for, if the Sheriff himself would have been liable as such, for such acts as the deputy was guilty of, he clearly is liable for such misconduct in his deputy.

4th. Potash Kettles, though set in an arch in the usual way, and used for the purpose of manufacturing &c. are personal property. But if strictly fixtures, and the owners treated them as personal property, and offered to turn them out, as such, they were clearly liable to be taken on execution, for the benefit of their creditors; and the officer can have no color of excuse for not complying.

5. There was no evidence in the case, tending to show, that the property in question was not the property of the execution debtors; and indeed that was not a subject of doubt in the minds of any. The officer suggested no doubt; and required no indemnity; but caused the property to be sold for his own benefit; and the property has never been claimed as belonging to any other than the *Bawkers*, the execution debtors at that time.

6th. There was no evidence in the case, which required the Court to charge on the subject of the plaintiff's having no interest in the suit; so that even an allusion to that point would have been entirely gratuitous and impertinent.

7th. There was no evidence, or even pretensions, that the officer trespassed on the rights of a third person; but this last point seems to be added, to finish the seven wonders of the case.

HUTCHINSON, C. J.—This appears to be an action upon the case against the defendant, as Sheriff, of the county of Franklin, for neglect of his deputy to levy an execution upon personal property, which the plaintiff contends he turned out to the deputy for that purpose. There was a jury trial in the County Court upon the general issue, and a verdict for the plaintiff; and exceptions taken to the instructions, given to the jury, and the want of instruction, requested by the defendant. There was also a motion in the arrest, which was overruled, and exceptions taken to

that decision. Upon these exceptions the action has come to this Court, and been argued by counsel, and is now to be determined.

The motion in arrest is urged upon the ground of the facts in the declaration. The second count fixes no value to the property which the plaintiff says he turned out on the execution: but only avers them to be of sufficient value to satisfy the execution. The first count does not describe the articles turned out, nor name their value; but only says he turned out upon said execution sufficient personal property to satisfy the same, with all cost.

These would be considered defects on demurrer; surely so on a special demurrer; but they are cured by the verdict. The jury could not have found a verdict for the plaintiff, without satisfactory evidence of specific articles, that were thus turned out to the deputy.

It is further urged, that the second count is bad in substance, because the gravamen of this count is a contract with the deputy to do an act aside from his duty, for the breach of which the Sheriff would not be liable. That part of the declaration is, "that the plaintiff, on the 13th day of January, 1829, offered to turn out to the deputy, upon said execution, three Potash Kettles, three Chaldrons and three Coolers and other property, all the property of the debtor, and sufficient in value to satisfy said execution, and all legal fees thereon; with directions to said deputy to hold said property on said execution, and dispose of the same in the month of March then next, according to law, and satisfy said execution with the avails, unless said execution should otherwise be satisfied; and the said deputy did then agree, that he would, on the then next day, to wit, January 7, 1829, without any further offer, or attempt on the part of the plaintiff, to turn out the same, take and hold, and dispose of the same, agreeably to said directions of the plaintiff. Yet he neglected so to do, &c." Now, if there is contained in this no charge of neglect of the deputy, the defendant is not liable for the injury. A deputy can make no contract that will render the Sheriff liable for the breach of it. He is holden for the official neglects only of his deputy. This was decided in this Court in the case of *Tomlinson* vs. *Wheeler*, in Error. See 1 Aikens R.

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194. But we do not consider the promise to be the substance of the charge in this count. The substance of the charge is, that he neglected to levy upon, and dispose of, the property of the debtor, when it was in his power. And what is said about his agreement is of no other consequence, than to operate as a waivor of any further turning out by the creditor. Under these circumstances, the property may be considered as actually turned out by the creditor, agreeably to the decision in 4 Mass. R. 60, *Marshal* vs. *Homer*.

We consider the decision upon this point correct. It appears, that the defendant's counsel requested several things in charge to the jury, which were not given.—1st. The Court were requested to instruct the jury, that the plaintiff's taking back the execution after the officer had done those acts, which render him liable, it discharges such liability.

This request is not supported by any testimony. It appears by the case, that at some period, and after the deputy had caused the same Kettles to be sold to satisfy some other execution, in which he had an interest, the plaintiff took back this execution, and procured an *alias*, and caused it to be levied on other property of the debtor, and thus collected about twenty dollars of his debt; but it cannot be discovered, from the case whether the execution had expired or not. If the creditor took back the execution at such a period, that it prevented the officer from completing his duty, such officer would not be liable. But the taking out an *alias* execution, after the officer had become liable, and causing it to be levied upon other property, and thus collecting a part of the debt, could not discharge the officer. It operates for his benefit.

The fifth and sixth heads of request, are without evidence to render them material. They require a charge, that the officer would not be liable if the Kettles were not the property of the debtor, nor if the plaintiff had no interest in the suit. There appears no evidence in the case to raise either of these questions. It is not the duty of the Court to give instructions to the jury upon any abstract point, not raised by the evidence. It would be error for the Court to instruct the jury to return a verdict for either

party, if they should find some particular fact, when no evidence went to the jury, tending to prove such fact.

The second request is for the Court to instruct the jury that a direction of the creditor, for the officer to take property and post it for sale at a time beyond the life of the execution, is not obligatory upon the officer. The facts in the bill of exceptions, upon which this request is predicated, are these. "The debtor, in the execution, offered to turn out, to the deputy of the defendant, some Potash Kettles, to be posted and sold on said execution to satisfy the same in March then next. This the deputy refused, because it would carry the sale befond the life of the execution. The deputy gave notice of this to the plaintiff, who directed the deputy to levy upon the Kettles, and post them, and sell them in March, according to the proposition of the debtor. He agreed, that he would do it. But he neglected to do it; and caused the same Kettles to be levied upon, and posted and sold by virtue of another execution; one in which he was himself interested." Now it is plain, that such a posting in January, and the sale to be made in March, by the mutual consent of the debtor and creditor, in the execution, is good and binding upon them. But the objection is, that the Sheriff is not holden for his deputy, to the creditor, who, by his consent, authorized a sale so far beyond the life of the execution. If this objection is valid, it must be because his risk is increased, by such a proceeding. The risk, to be sure, is on the deputy and his bail. But, should they be unable to bear the risk, and save the Sheriff harmless, what is the increase of risk? If the property should be receipted, the risk would be on the receiptor. If the property was taken into actual custody, and kept with common prudence, the risk would rest on the plaintiff, by reason of his consent to the proceedings. These facts did not entitle the defendant to such a charge to the jury, as he requested.

The third point of request, as to an agreement of a deputy to do an act aside from official duty, is disposed of, while the motion in arrest was under consideration.

The fourth point of request is, that the Court would instruct the jury, that Potash Kettles, set in brick arches in a Potash, in the usual way for use, as the case shows

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these to have been, with chimnies to the arches, are real estate—and the seventh point rests on the same principle with this fourth point. These may be disposed of, by merely referring to the facts in the bill of exceptions; where it appears, that the debtor was willing to turn out the Kettles as personal property; and that the same officer caused them to sold, as personal property, on his own execution. But there is an urgent request, that we should decide, whether Kettles, thus situated, are personal estate. We entertain no doubt upon this point. If Kettles thus set, are treated as fastened to the freehold at all, it is temporary merely. They are set in the arches, and taken out; and the injury to the brick work, in taking out, is too trifling to designate them real estate while there.

The Bill of exceptions present another question, upon the right of counsel to request the Court to charge upon any definite point, after the charge is through, but while the jury remain in their place. In the case of *Stanton* vs. *Bannister*, reported in 2d of Vt. Rep. 464; it was decided, that the counsel had no right, at this period of the trial, to request the Court to charge the jury upon a new point not before noticed during the trial. It would seem to be a correct practical course, for the judge to feel himself under obligation to instruct the jury upon every point of law, litigated during the trial, and connected with the evidence adduced, whether requested so to do or not. And the party excepting to the charge, should except before the jury leave their places. But, after the Judge has committed the cause to the jury, the party, who would except to the charge, should merely say, that, he excepts to the charge upon such and such points, naming them, and excepts to the Court's not charging upon such other points as he names. This will place it in the power of the Court to correct their charge, if they conceive there is any mistake; and also remind them of any point which may have been forgotten.

In our notice of the points on which the Court were requested to give instructions to the jury, we have sanctioned all the instructions, given, except what related to the rule of damages. Upon this point the instructions were, that the jury should find the value of the property, which might

have been taken by the deputy, if that value should not exceed the balance yet due upon the plaintiff's execution, &c. The exception, urged to this is, that the auction price should have been prescribed as the rule to ascertain the value. If the deputy of the defendant had sold the property in good faith, at auction, the plaintiff could claim nothing but the avails of the auction sale. But as the defendant's deputy neglected this, and thereby failed to furnish evidence of what would be the auction value, he must not be permitted to drive the plaintiff into the uncertainty of auction price, which is unlike in different places, and at different times in the same place; which is so fluctuating, in fact as to furnish no rule whatever. In such circumstances, the defendant must be content to have the cash value assessed upon this property. This disposes of the various exceptions, taken by the defendant, and the judgement of the County Court is affirmed.

Hunt, for defendant.

Wilson, for plaintiff.

THOMAS CHIPMAN *vs.* SETH BATES.

If in an account between parties, the plaintiff exhibits some items of more than six years standing, and some subsequent, and there appear no credits by the plaintiff nor charges of the defendant within that period, a recovery can be had for the last items only, the others being barred by the statute of limitation.

When the parties son was sent to demand a specific amount on an unliquidated claim, an offer made him by the other party of a less sum, cannot be regarded as a legal tender to the father.

In a suit originally commenced before a Justice of the Peace, appealed to the County Court, and there ruled out to a referee; *held*, that a tender not having been made before the Justice, nor at the County Court, could not avail the defendant before the referee.

This was an action originally commenced before a single magistrate, from whose judgement an appeal was taken to the County Court, and there ruled out to a referee, from whose report the following facts are drawn. The plaintiff exhibited an account, the first nine items of which the referee disallowed, on the ground that they were barred by the statute of limitation as insisted by the defendant.—Two other charges of the plaintiff's account which seem to

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have been within six years, were allowed by the reference, to wit. Three dollars for the use of a horse, and fifty cents for keeping sheep. In relation to these last mentioned charges the referee reported as follows:

"It was proved that the plaintiff a short time previous to the commencement of the suit, sent his son Thomas Chipman, jr. to demand of def't. *four* Dollars as payment for the use of the horse, that the defendant tendered to him $3,00 for the use of the horse, and fifty cents for keeping sheep, which he refused. The defendant brought the said $3,50 and pleaded it on trial before your referee, and he herewith delivers it into Court. It was further proved that at the return day of the writ, the defendant appeared and procured a continuance of the cause for the purpose of procuring counsel; and that on the day to which the cause was continued he again appeared, and not having counsel submitted to a judgement without any trial, and without bringing into Court, the money tendered. That at the time at which the appeal was entered the cause was referred, and the money tendered was not then produced in Court. The plaintiff contended that upon this proof the defendant waived his tender, and that he could not avail himself of it before the referee. But the referee was of a different opinion and therefore reports that the defendant has legally tendered the sum in which he is in arrear to the plaintiff, and ought to recover his costs."

To this report, the plaintiff filed the following exceptions:

1st. Because the said referee decided contrary to Law in rejecting the first nine items in the plaintiff's account on the ground that the same were barred by the Statute of limitations; the tenth item in said account having been delivered within six years after the delivery of the nine items.

2d. That the said referee decided contrary to law in deciding the tender to be legal; the said Thomas contending that the said defendant had waived the right of pleading the tender by having neglected so to do, before the Court below.

Maeck, for plaintiff.—There are two exceptions to the report of the referee.

1. He mistook the law in deciding a portion of plaintiff's account barred by the Statute of limitations. We contend that although a portion of the account may be of more than six years standing, yet if the account is running and the previous items are followed by other items within six years, the whole account is taken out of Statute. Every new item of debt or credit is an acknowledgement of a previous unsettled account and a promise to pay the balance, 2 Mass. 217; 6 Ter. R. 189; 2 Vt. R. 146.

2d. The tender ought not to have been allowed.

1st. It was not made at the proper place or to the proper person. From the Report it appears to have been made to a mere agent who was authorized to receive a different sum, and not made at the house of the creditor. The only cases where a tender to an agent has been held good are where the debtor to save himself was bound to make his tender at a particular place, and if the creditor was not there to receive, as it was his duty to have been, the tender may be made to his servant. The law in those cases presumes he has left his instructions with the servant. Dan. Vol. 5, 498.

2d. If the tender was originally good he has forfeited all rights under it by his subsequent conduct. This will be fully evinced by applying the rules of law applicable in cases of this kind to the facts as they are stated in the report and record. Before the magistrate he made no defence of this kind, but we contend he ought there to have plead orally at least his tender and have brought the money into Court. It is laid down in all the books that in Indebitatus assumpsit, the party who pleads a tender must aver in his plea, 1st. That he has always been ready to pay.—2d. That he is still ready.—3d. That he must bring the money into Court; and 4thly. That this plea cannot be pleaded after a general imparlance; and if a tender be pleaded after an imparlance the plaintiff may sign judgement or apply to the Court to set under the plea, or demur, or allege the imparlance in his replication by way of estoppel. Tidds Prac. 418; Willson, 632; Ld. Raymond, 25 & 254; 2 Salkield, 622 & 623; 10 Mod. 81; 12 Mod.

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8, 158, 354; 5 Bac. Abg. 517; 5 Danes Dig. 500, 485, 488. The authorities all go upon the ground that the defendant by asking time to plead, contradicts the first material requisite in his plea, and shows that he has not always been ready to pay.

Bailey & Marsh, for defendant.—1st. There is nothing in the case to exempt the first nine articles of plaintiff's account from the statute of limitations. They accrued more than six years before the commencement of the action. The accounts were not mutual, no credit being given by plaintiff nor any account exhibited by defendant. *Cotes* vs. *Harris*, Buller, N. P. 149. These items cannot be brought within the exception relating to merchant's accounts; nor is there any evidence of an express promise, or of facts from which a promise can be implied.

2d. The only question properly arising under the third exception is; whether the defendant has waived his tender by not pleading it in the Court below. The strictness with which the plea of tender was anciently received has been of late years greatly relaxed. It was looked upon for no sufficient reason surely, as a suspicious, not to say a dishonest defence, and was required to be pleaded with great formality, upon entering the appearance in the cause. It is now holden in England as well as in this country to be an honest defence, and one equally entitled to be favorably received with any other. Nor is it now necessary to plead it before imparlance. If pleaded in vacation and entiled of the preceding term it is enough. 1 Burrow 59; *Noon* vs. *Smith*, 1 H. Blackstone, 369.

The practice in this state, with respect to filing the plea, is the same as in England, at least in those counties where causes are continued of course for pleading; and as to paying the money into Court, it is well understood not to be necessary until the cause is called up for trial.

Unless it appears that the plaintiff has or might have sustained some damage in consequence of the neglect of the defendant to plead the tender in the Court below, the Court ought not now to reject the plea, upon technical grounds which certainly had not originally any solid foundation. The case shews that the question was not

whether a tender was made in fact, but whether *enough* was tendered, and the bringing of a suit, without a demand of the sum, previously tendered, shews that the object of the suit was to recover, not what the defendant admitted to be due, but the excess of the plaintiff's account over that sum. There was no trial before the magistrate, nor any issue joined, except for forms sake, and if the money had been paid into the hands of the magistrate there is no ground to presume that plaintiff would have taken it out and abandoned his suit, but the contrary. Between the appeal and the session of the County Court he could not have taken it out, because the authority of the justice in the cause ends with the appeal, and he could not have paid the money to plaintiff, even if it had remained in his hands. But it would not have remained in his hands. It is the business of the appellant to carry up to the County Court the copy of the proceedings below and every thing else that belongs to the case. If then the defendant had paid the money to the justice, it would have been the duty of the justice to pay it back again forthwith, upon the entering of the appeal, and demanding of the copy by defendant. This would be a very idle ceremony. Nor could the plaintiff have taken the money, after the cause was entered in the County Court, for the whole matter was taken away from the Court by the reference, on the entering of the appearance. It does not appear then that the plaintiff has sustained any damage by the neglect of defendant and the defence ought not therefore to be rejected.

PADDOCK, J.—The items of account exhibited before the referee, have not been brought into Court, but from his report, we learn there was no exhibits on the part of the defendant, nor had the plaintiff any credits on his book, so that the question for the referee to decide was, whither the statute of limitation should bar those items of account which were of more than six years standing; this question was virtually settled in the case of *Hutchinson & Dunham* vs. *Pratt*, 2. Vt. Rep. 146. The case of *Cotes* vs. *Harris*, cited in Bul. N. P. 149, was then considered as law, and must now govern in this case.

As it respects the tender, it appears that a short time

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before the commencement of the plaintiff's suit, he sent his son to the defendant to demand of him $4,00 in payment for the use of a horse; the defendant tendered him $3,00 for the use of the horse, and 50 cents for the keeping of sheep, both of which sums the son declined taking. A suit was then commenced before a justice, a silent judgement given, and appealed to the County Court and there ruled out to referee whose report is before us; and that the defendant made no mention of his tender before the justice, in the County Court, but relied upon it before the referee, who considered the sum legally tendered and that, although not offered in the Justice or County Court, he had a right to produce and have it allowed before him. The Court consider that the offer of the $3,50 to the son of the plaintiff under these circumstances, cannot be regarded as a legal tender; here was an unliquidated claim, and the boy had no authority from his father to make a compromise. To receive the $4,00 if paid, was all he could legally do; whither the plaintiff would or would not have received the $3,50 had the same been tendered to him before the commencement of the suit, we have no means of judgeing. A tender ought always to be made under such circumstances, as that the claimant can exercise his judgement in receiving or refusing it; and because money cannot safely be counted in the night, a landlord shall not distrain for his rent, but in the day time, Coke Lit. 142.— There is an anonymous case in Esp. N. P. Cases, where a tender was made to a servant, who carried the money in to his master and brought back word that he would not receive it, and adjudged a good tender; but that case differs widely from this, it does not appear here, that the plaintiff ever heard of this tender, until he met it in the referee's court; had this claim been a note, on which by computation the sum due could have been ascertained, and a sum equal to the amount due had been offered by the defendant, and rejected by the boy, there would have been some reason in saying that, as he was the bearer of the note, the defendant was justified in treating him as the authorized agent of the plaintiff, to receive what was his due, and a refusal of the agent a refusal of the principal; but here, the boy had no authority but to ask for and receive the $4,00.

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But could we overcome this objection, yet, the defendant is involved in difficulty, in not carrying his money into the justice court, ready to discharge himself if the plaintiff would receive it, and again, into the County Court. Will it be said the plaintiff should have demanded it of him? If the tender in the first instance had been legal, his not demanding it before suit might involve a question of costs, but in no wise will it excuse the defendant for not offering to pay when called into a court of justice to show cause why he has not paid. The tender admits an indebtedness; and that he has offered to pay the amount which the plaintiff refused to receive, is the reason he offers for not having discharged that indebtedness; and that he has now deposited the same sum in the hands of his clerk, would have been one of the best reasons why the plaintiff should not further have or maintain his action against him. *Harding* vs. *Spicer*, 1 Camp. 327 & *note; Giles* vs. *Hartis*, Ld. Ray, 254; Chitty's Forms, 431. The facts having been found by the referee, the Court direct judgement to be entered for the plaintiff to recover of the defendant $3,50 damages and his costs.

WM. A. PRENTISS VS. JOSEPH SINCLAIR.

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Where one of the partners retires from a firm, to discharge him from subsequent transactions, *actual* knowledge of the dissolution must be carried home to the creditor with whom there was a previous deal.

Dictum. **But a publication in the Gazette of the place where the business of the partnership was transacted, is a sufficient notice of the dissolution to all persons who had no previous connexion.**

This was an action on book in which a judgement to account was rendered, and an auditor appointed, who made a special report of the facts as they appear in the decision of the Judge who delivered the opinion of the Court. Upon this report the County Court rendered a judgement in favor of the plaintiff for the sum of $150, 91, to which opinion an exception was taken by the defendant on the ground that no sufficient legal notice was ever given to him of the dissolution of the partnership.

Defdt's Counsel contended, that notice in the Gazette of dissolution is not sufficient as to a person dealing with the

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partnership previous to dissolution. And without notice the partnership would not be discharged. He cited 1 Phil. Ev. 306; Comy. Cont. 504; 3 Kent. Com. 38 & 9; 2 Stark. R. 290; Peak. N, P. C. 42-154; 1 Camp. 403.

PADDOCK, J.—This case presents the single question, *what shall be deemed notice to an individual of the dissolution of a copartnership*, with whom such individual had been in the habit of dealing, so that property delivered to the partner going out of the concern, shall not be recovered for, against those remaining in.

The auditor in this case has reported, that previous to the first day of March 1827, the plaintiff *Wm. A. Prentiss, & Thomas M. Taylor* were partners in trade, under the firm of *Taylor & Prentiss*; that on that day, they dissolved their partnership and the business was assumed by Taylor, who carried it on in his own name until April, 1827, when he sold out the stock of goods and establishment to Prentiss; that Prentiss transacted the same kind of business until the 10th of April, 1829, when he again took Taylor into the concern as a partner; that this defendant Sinclair had a deal with the firm previous to the dissolution in 1827, and continued the same with Taylor afterwards, and subsequently with Prentiss up to the 10th of April 1829, and now brings in his account which accrued during the whole period, in offset against that which he made with Prentiss while alone. The auditor further reports, that upon the dissolution of the partnership in March 1827, public notices were posted up in the store & in the public house, (which we understand was in the neighborhood,) which the defendant saw, and was otherwise informed that the partnership was determined.

This is a question which has often been agitated in other courts, and is perhaps as well settled as any other point of law; Where individuals unite their interests and transact their business in the name of a firm, and procure credits upon the joint responsibility of all the partners, when one retires, it is reasonable that the public should have notice of it; and the dissolution published in the Gazette of the place where they transacted their business, has been considered reasonable notice to all who have not had a previ-

ous deal with the firm. *Lansing* vs. *Pain & Ten. Eyck*, 2 John. 304; Watson, 384. But it is necessary to carry home the knowledge of the dissolution to those with whom the firm have previously dealt, and in the case cited by counsel from Peakes N. P. *Gorham et al* vs. *Thompson et al*, Lord Kenyon held, "that to discharge the partner retiring from the partnership, there must be a public notice in the Gazette, or at least the dissolution must be notorious to the public, and actual knowledge of it carried home to the creditor." 1 Esp. 371; 1 Swift. Dig. 349; and there is no reason why the same rule should not be adopted here, as in Englahd and our neighboring States; any thing short of actual notice would always leave so much doubt and uncertainty upon the minds of those of whom a credit is asked, as to give a check to commercial intercourse, and would also open a door to much fraud. But in this case, there can be no doubt that the defendant had actual notice. If the defendant saw the notice of the dissolution which was posted up, one must infer that he read it; and in addition to such notice, and information given him by others to the same import, in January, 1828, he drew an order, not on the firm, but on the plaintiff, for the delivery of goods; and it is a circumstance not be lost sight of, that upon the dissolution, the company sign was taken down, and the plaintiff's placed over the door; this to a cautious man, would at least put him on the enquiry; we are all of opinion that the notice to the defendant was sufficient, and the judgement of the County Court must bo affirmed.

Judgement affirmed.

Adams, for plaintiff.
Porter, for defendant.

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WILLIAM BRADLEY *vs.* SAMUEL ANDERSON.

Parol evidence is inadmissible to contradict, vary, or explain a written contract, or show it different from what it purports to be.

If A. as payee of a promissory note, sue B. as maker of the same; B. shall not be permitted to give parol evidence of facts, which amount only to an *innocent mistake* in A. in writing the note, to prevent A's recovery; nor shall B. give parol evidence of such facts, under a false pretence, that they show *fraud* in A in writing the note.

This was an action of assumpsit upon a promissory note dated April 23, 1828, for the sum of fifty-five dollars payable in cattle or grain, two years after date, with interest—Plea, General Issue.—Upon the trial of this issue, the defendant contended that a mistake had been made or fraud practised upon him by the plaintiff, in writing the note, which was admitted to have been written by the plaintiff, and that the contract as agreed upon by the parties at the time of the execution of the note in question was, that the note was to be made payable in two years from its date in his, the defendant's work as a carpenter, or in cattle in the month of October, or in grain in the January following; and to maintain the issue on his part, offered to prove that the plaintiff in the month of December, 1829, admitted that such was the contract on which the note was given, and that the note was so written. And, also, that on one other occasion, subsequent to the date of the note, the plaintiff informed the witness that he had a note against the defendant, and the defendant did not know when it would be due.—All which evidence was objected to, and excluded by the Court, upon which the defendant excepted. The exception was allowed by the Court below and comes here for adjudication.

Opinion of the Court was pronounced by

BAYLIES, J.—Parol evidence is inadmissible to contradict, vary, or explain a written contract, or to show it different from what it purports to be on the face of it, for reasons assigned by *Lord Coke*, who says, "It would be inconvenient, that matters in writing made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties to be proved by the uncertain

testimony of slippery memory; and it would be dangerous to purchasers, andall others in such cases, if such crude averments against matter in writing should be admitted." *Countess of Rutland's case*, 5 Rep. 26.

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Although these observations were made concerning a deed, they will equally well apply to any written contract not under seal.

If parol evidence, which is offered to the jury to superadd something to a written contract, would vary such contract, the evidence is inadmissible. *Powell* vs. *Edmunds*, 12 East. 6; *Graves* vs. *Ashlin*, 3 Camp. 426.

So it has been decided, that parolevidenceis inadmissible for the purpose of altering the legal operation of an instrument, by evidence of *an intention* to that effect, which is not expressed in the instrument. Thus the defendant cannot be admitted to prove that at the time of making a promissory note, it was agreed, that when the note became due, payment should not be demanded, but that the note should be renewed. *Hoar vs. Graham*, 3 Camp. 57. *Hogg* vs. *Smith*, 1 Taunt. 347. No parol evidence can be received to explain an agreement in which there is no *latent ambiguity; Coker* vs. *Guy*, 2 B & P. 565. Nor to prove an additional rent payable by a tenant beyond that expressed in the written agreement for a lease; *Preston* vs. *Mucean*, 2 Black. 1249. Nor to show that a part of the premises contained in a deed were intended to be excepted from the grant; *Jackson* vs. *Gray*, 12 J. R. 427. Nor to show that a lease executed in the name of, and reserving a rent to, one person, was intended for the benefit of another; *Jackson* vs. *Foster*, 12 J. R. 488. Nor to show a *mistake* in a note or written agreement. *Fitzhugh* vs. *Runyon*, 8, J. R. 375.

In the case of *Stackpole* vs. *Arnold*, 11 Mass. Rep. 27, the Court decide, that parol evidence is inadmissible to contradict, vary, or materially affect any written contract whether under seal or not: but as an exception to this rule the want of consideration for a promissory note, or fraud in obtaining it, may be shown by parol evidence in an action on the note between the original parties.

The subject of parol evidence being admitted to affect written contracts, has aften been before this Court; but I

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shall remark upon only a single case: *Brown* brought his action against *Bebee* on a promissory note of the following tenor:

"*Sixteenth of March*, 1812.

For value received I promise to pay Jonathan Brown Sixteen, on the first day of May next, with interest."

(Signed) AARON BEBEE.

The plaintiff in his declaration averred, that the word, *Sxiteen* in the note, meant *Sixteen Dollars*, and on trial offered to prove his averment by parol evidence, which was objected to, and excluded by the County Court. The defendant excepted, and the case came to this Court to be heard at Rutland, Feb. Term, 1814. *Chipman*, C. J. in pronouncing the opinion of the Court, said "the rule certainly is, that parol proof cannot be admitted to explain, extend, or vary a written contract. There is but one exception, if it may be called an exception, that is, in the case, of a *latent ambiguity*. As in the case usually put, of a devise to A. and there are two persons by the name of A. father and son; appearing by parol proof, introduces an *ambiguity*, as to the person intended by the testator. But as the *ambiguity* is not apparent on the face of the devise, it is called *latent ambiguity*. And as it is raised by parol, it may be explained by parol. But where there is a devise of $50,000 wholly omitting to name any devisee; this is a *patent ambiguity*, which cannot be explained by parol."

But it is said, that this is *a mistake*, and that *mistakes* are allowed to be rectified. There are cases in which a Court of Chancery will correct *a mistake*, or rather, compel the party to correct it, by supplying what was omitted *by mistake*; but this does not belong to a Court of law."

"But in this action, brought on the note, the County Court were right in rejecting parol evidence, to prove what the note should have been, or how it should have been written; the decision is supported equally by precedent, and the soundest principles." 1 D. Chip. Rep. 228.

It now remains for us to apply the above principles of law to the case before us, and come to a decision, whether the County Court erred in excluding the evidence, which was offered by the defendant.

The note in suit was dated April 23, 1828, for $55,00

payable in cattle, or grain, two years after date with interest.

The defendant offered parol evidence to prove, "that the contract as agreed upon by the parties at the time of the execution of the note in question, was, that the note was to be made payable in two years from its date in his the defendant's work as a carpenter, or in cattle in the month of October, or grain in the January following."— And to induce the Court to admit the evidence, the defendant insisted, "that *a mistake* had been made, or *fraud* practised upon him by the plaintiff, in writing the note, which was admitted to have been written by the plaintiff. If it were merely a mistake in writing the note the above cases in the 8 J. R. 375, & 1 D. Chip. Rep. 228 show that parol evidence is inadmissible to prove such *mistake*. It is not suggested, that the plaintiff intentionally wrote the note differently from the contract; nor that the defendant did not read the note, and understood its contents before he signed it; therefore, if there was a difference between the note and contract, we are not to conclude, that it was the effect of *fraud*, but of *mistake*, which could not be given in evidence to affect the plaintiff's right of recovery.

Again, to admit this evidence, when there was nothing but a *mistake*, would be to admit evidence *to contradict*, or *vary* the note, which is not admissible.

So if "the plaintiff informed the witness, that he had a note against the defendant, and the defendant did not know when it would be due," it did not tend to show, that the plaintiff was guilty of a *fraud* in writing the note. It is always the intendment of law, that a person is innocent of a *fraud*, or any other imputation affecting his character, until it is made to appear. We consider, in this case, all the facts, offered to be proved, were entirely insufficient in the law to show that the plaintiff had been guilty of a *fraud*; therefore the parol evidence offered to prove those facts was properly excluded, not only as it respected a *mistake*; but also as it respected *fraud* in writing the note different from the contract.

The judgement of the County Court is affirmed.

Manser, for plaintiff.

Briggs, for defendant.

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ISAAC WARNER vs. NATHAN HALL.

If A. execute a note at the Bank as surety for B. & C. and B. abscond before it falls due, and A. knowing the fact, call on C. and get him to renew the note without disclosing it, yet if A. ultimately pay the Bank, he can recover the amount of C. and this although as between B. & C. the latter was entitled to indemnity.

This was an action of Indebitatus Assumpsit commenced in the County Court.—Plea, Non Assumpsit—and Issue to the Jury.

On trial, the plaintiff, claimed the sum of $200 and interest for that sum, which he alleged he had paid as surety for the defendant and one Solomon Morton to the Branch Bank at Burlington. It appeared in evidence, that before tha 29th September, 1830, Morton had executed a note, to C. F. Warner, & Co. for about $160, and that Hall signed the said note as surety for Morton—that this note being due on the said 29th Sept. 1830, Morton and Hall made a note to the Branch Bank for $200, and that Warner signed it with them at the time at their request as surety :—that Warner received the money on the note, and after paying the amount of the note to C. F. Warner, & Co. the balance was paid over to Morton.

The defendant contended that the plaintiff ought not to recover, and by way of defence introduced witnesses who testified to the following facts.

That said Morton absconded on Saturday, the last day of December, 1830, and Warner was informed of this fact the next morning, at which time Warner came to the Bank, and on inspection found the note due that day. That Warner immediately came to the conclusion to see Hall and was in Williston about noon the same day, and then and there stated to Hall that the Bank Note fell due that day, and said he doubted whether Morton would make out the money, and advised to have a renewal note made :—that Hall objected to signing another note, and stated he thought Morton would make out the money, but at length consented to sign on the suggestion of Warner, that he would make a new note and leave a space for Morton to sigh his name first, and that Hall and himself would sign under his; that Warner should go by the way of Morton's, call on him for the money, and if he got it, or any part of it, he would en-

dorse it upon the note; and if he did not get the money, would get Morton's signature to the note, carry it to the Bank, and with it take up the first note:—that the note was so made out, and signed by Hall and Warner:—and Warner took it, and went away towards Morton's, who lived between two and three miles from Hall's.

It also appeared that in the afternoon of the same day, Warner took up the first note by leaving the last one signed by Hall and himself, and that he has since paid the note last mentioned.

It further appeared, that Morton, left real estate in Williston, to the amount of about four hundred dollars, which was attached by two writs on Monday the 3d of January, 1831, at 9 o'clock in the forenoon, and by two other writs on the succeeding Tuesday morning, upon which judgements have been rendered, and all said estate set off in satisfaction of them, and holden by those creditors. It did not appear that Hall knew that Morton had absconded, prior to said attachments.

The counsel for the defendant, requested the Court to charge the jury, that if they believed the foregoing testimony to be true, they ought to return a verdict, for the defendant upon the ground, as urged by his counsel, that Warner ought either to have pursued after Morton, or communicated the fact to Hall, at Hall's house, when he saw him, that Morton had absconded, thereby giving Hall an opportunity to secure the debt either by pursuing after Morton, or by an attachment of his property; and that by neglecting to give the information to Hall, and carefully secreting the fact from him, and thus preventing his securing the demand, he had forfeited all equitable and legal claim upon Hall for the money. But the Court refused so to direct the jury, but charged them that the facts testified to would amount to no defence to the action.

To which opinion and charge of the County Court the counsel for the defendant excepted, and the case was reserved for the opinion of this Court.

Richardson for defendant.—Contended that such a concealment of facts from the defendant, by the plaintiff, as tended to deprive him of the means of securing himself,

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was a fraud. And cited 2 Stark. Ev. 467, *Vernon* vs. *Keyes*, 12 East. 632; *Moses* vs. *McFarland*; 2 Bur. 1006.

Fraud is an extrinsic collateral act which vitiates all transactions, even the most solemn proceeding of Courts of Justice, 2 Stark. E. 575; 2 Dane, 545.

Adams for plaintiff, contended, 1st. The note originally executed by Morton & Hall to C F. Warner, & Co. was collectable as well of Hall as of Morton.

2d. When this note was paid by means of the Bank Note, signed by Morton & Hall and plaintiff, in contemplation of law, Morton & Hall became principals and the plaintiff was surety for both.

3d. But it distinctly appears by the exceptions that the plaintiff signed this note to the Bank at the joint request of Morton & Hall.

4th. It is a matter of no importance in what character Hall signed the first note, for if the second note was signed by plaintiff for Hall & Morton or at their request he has a right to demand of Hall payment for the whole sum he has paid to the Bank.

5th. The evidence relative to the execution of the last note, the absconding of Morton and subsequent attachment of his property is immaterial, and can have no possible bearing in the cause.

The opinion of the Court was pronounced by

PHELPS, J.—A single exception only is taken in this case. It is to the charge of the Court in instructing the jury, that the evidence offered by the defendant, as stated in the bill of exception, constituted no defence to the action.

If the liability of the defendant, originated in the execution of the note on the first of January 1831, and depended now upon that fact and the payment of it by the plaintiff, there is no doubt that the evidence offered by the defendant would have been pertinent and proper, as shewing a substantial defence. It is certainly to be inferred, that the defendant signed that note with the expectation that Morton should also sign as a principal, and in ignorance of the fact that Morton had absconded. It is also to be inferred, that the plaintiff knew, or at least had reason to

believe, that he had absconded; and the suppression of the facts, under such circumstances, would be deemed such a fraud upon the defendant, as would in equity and in law vitiate the note.

It appears however, that the plaintiff had previously executed with Morton and Hall, at their joint request, a note to the Bank of the United States, for the purpose of satisfying a note by them previously executed to Warner & Co. With respect to this note, Warner is clearly to be considered as surety for the two, and having a legal claim against them both for an indemnity. The note first mentioned was, it appears, substituted at the Bank, for the former one, and the amount ultimately paid by the plaintiff. Upon this statement of facts, we are of opinion, that the payment made by the plaintiff is to be referred to the original debt contracted by the three at the Bank, and to be regarded simply as a payment by the surety, of the debt of his principal. The interposition of the note executed on the first of January, 1831, we consider of no importance. Admitting it to be void, so far as the defendant was concerned, it certainly did not satisfy his liability to the plaintiff, nor can it be considered as satisfying the debt to the Bank, unless it be regarded as binding on the plaintiff, and if we are to hold it in that point of view as a payment to the Bank, it amounts to a direct and immediate payment by the plaintiff of the proper debt of Hall & Morton. Whether we consider that note therefore as binding on both, on the plaintiff alone, or on neither, the result is the same. Upon the first supposition we must regard Hall as principal and Warner as surety, and the payment by the latter, will sustain the action; and upon either of the two latter the plaintiff must be considered to have paid the original debt, and is entitled to a full indemnity. If it be indifferent what effect we give to that note, or whether we give it any, it certainly is unimportant how it was obtained. Conceding therefore to the defendant all he claims as the result of his evidence, it leaves his original obligation to the plaintiff unimpaired and the plaintiff's claim unsatified.

An attempt is however made to give to this supposed fraud a retro-active effect, and to bring it to bear upon a previous bona fide transaction, and that in such a manner

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as to discharge an undoubted obligation previously existing. The situation of the defendant is in no wise varied from what it would have been, had not the transaction complained of took place. The only effect of obtaining the note in question was to suspend the plaintiff's claim for the period for which the note was to run, and to give the defendant further time for the payment.

It is argued, that the defendant was injured by the omission of the plaintiff to give information that Morton had absconded, and that, in consequence of that omission, he has lost the opportunity of obtaining indemnity. Admitting the defendant to have been originally a surety for Morton in this transaction, it is still to be borne in mind that the plaintiff was a mere surety for him; and however courteous it might have been, in the plaintiff to give the desired information, and however the defendant might have been benefited by it, as an act of friendly courtesy, it can hardly be seriously contended, that the law imposed upon the plaintiff the burthen of providing means of indemnity to the defendant, or of seeing to his interests.— Unless it can be made out, that a legal obligation rested on the plaintiff to give the information, the omission to do so can not be regarded as a legal delinquency, or as attended with legal consequences. It is an omission to do that, which he was under no legal obligation to do; and if it be censurable it is so only as evincing a want of that friendly regard for the interests of his neighbor, which the law leaves to other tribunals than its own to enforce.

We consider that the direction of the trial was right and the judgement of the County Court is affirmed.

Heman Barrows vs. Lane & Benham.

Chittenden, *December*, 1832.

If A. execute to B. his promissory Note, and C. endorse his name in blank on the same, parole evidence is admissible to show the understanding, that C. was to be holden only collaterally.

This was an action of assumpsit upon a promissory note for the sum of twenty-four dollars, dated December 14th 1829, payable to the plaintiff, in good neat cattle, by the first day of October, A. D. 1830, or in grain in the month of January thereafter, and signed by the defendant Lane, and endorsed in blank by the defendant Benham.

Plea, General Issue.—On the trial of this issue the defendant Benham offered evidence showing, that at the time of the indorsement by him he refused to sign the note *with* Lane, or be liable with him as a joint promissor; but that he indorsed the note under the express agreement, that Lane, the signer should first be prosecuted, and in the event that Lane failed, that he was to guarantee the payment of the note. This evidence was by the Court admitted; and upon it the defendants contended, that Benham was not liable as a joint promissor, and moved the Court to be permitted to fill up the indorsement agreeable to the contract between the parties, when the blank indorsement was made. But the Court charged the jury that the indorsement, having been made on the same day, the defendant Benham was by law liable as a joint promissor; and directed a verdict for the plaintiff. To this charge and direction of the Court the defendants excepted and the cause passed to the Supreme Court.

Manser for plaintiff.—The plaintiff in this case contends that the signature of Benham, one of the defendants, upon the back of the note, in blank, constitutes him an original promissor.

1st. If A. give his note, and B. at the same time, indorse his name in blank upon the back of it, B. is an original promissor, and not a guarantor or indorser. *Hunt Ad.* vs. *Adams*, 5 Mass. 358, do. *Carver* vs. *Warren*, 545; 9 Mass. 314, *White* vs. *Howland*; 6 Mass. 519, *Hunt Ad.* vs. *Adams*: 13 Johns. 175 *Nelson* vs. *Dubois*.

2d. The evidence, offered by Benham, shewing what he considered the understanding at the time he indorsed

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the note was not admissible. 7 Mass. 518, *Hunt* vs. *Adams*; 1 Swift Digest. 180.

3d. If one indorse his name in blank, on a note to which he is not a party, the promissor may fill up the indorsement so as to charge him as a joint and several promissor. 6 Mass. 386, *Blakely* vs. *Grant*; 11 Mass. 436, *Moies* vs. *Bird*; 3 Mass. 274, *Joselyn* vs. *Ames*; Doug. Rep. 514, *Russell* vs. *Langstaffe*.

4th. The undertaking of Benham at the time, was not a *collateral*, but a direct undertaking on his part; for the legal presumption is that Barrows parted with the property which was the consideration of the note in question, in consequence of the signature of Benham. 11 Mass. 436, *Moies* vs. *Bird*.

Briggs, for defendant.—If Benham is not a joint promissor in virtue of his indorsement, then the action cannot be maintained; and in no sense, can he be so considered. The contract of the indorser, is collateral; he does not engage to pay the note, according to its terms, as does the maker, but to be responsible that the maker pays; and even this responsibility is discharged on neglect of notice, &c. He is therefore merely a guarantor and not a joint contractor; and since this Court have decided that instruments of this description are to be treated as promissory notes, the fact that the note is payable in specific articles can make no difference, but leaves the responsibility of the indorser as it was at common law, and no case can be found where the action was ever brought against the indorser and maker as joint promissors.

From the nature of the case, Benham could be nothing more than a surety. In the absence of all other evidence of the nature and extent of his contract than the blank indorsement, the law would determine his obligations. But here the contract expressly was, that Benham was not to be a principal; that Barrows should pursue the maker, and Benham was not to be liable till the prosecution being ended, Lane's inability to pay was established. Such evidence was proper, and ought to have been left to the jury.

In *Rhodes* vs. *Risley*, 1 D. Chipman's Rep. 52, the Court

received evidence to show that the endorsement was made for the purpose of filling a power of Attorney, and not to transfer the property of the note. In *Miner* vs. *Robinson*, D. Chipman's Rep. 392, evidence to establish the same facts, offered to be proved here, was received. In *Baker* vs. *Prentiss*, 6 Mass Rep. 430, evidence was received to show that the indorsement was for the purpose of collection and not for transfer of property of the note.

In these and other cases there cited, it was decided that where the indorsement was in blank, the contract between the original parties, with its conditions, and limitations might be shown by the indorser.

The opinion of the Court was pronounced by

PHELPS, J.—At the trial in the Court below, my first impression was in favor of the defendant, and I should have admitted the evidence, had not the case of *Hunt* vs. *Adams* been presented. But conceiving at the moment that that case governed the present, and having no leisure to examine it, the evidence was rejected. If the effect of an indorsement of this kind were to make the indorser a joint promissor, I could see no distinction between one promissor and the other; and no reason why one could explain his contract by parole if the other could not. I am now satisfied that the principle of those decisions was misapprehended, and so are my brethren.

The law on this subject may be expressed in a few words. The mere name of a person upon blank paper of itself means nothing. It is evidence of no contract and has no legal import. To give it any legal effect, evidence is necessary of a delivery of the signature and the general purpose of that delivery. When however such proof is had, such signature becomes binding upon the party in any way or manner consistent with the purpose of delivery. It is an authority to the holder to make the particular terms of the contract such as he pleases, provided it falls within the general scope of the transaction in view. Hence a blank signature delivered for the purpose of having a promissory note or bill of exchange written upon the paper, is in effect an indefinite letter of credit. Doug. Rep. 514. But even in this case, the delivery and the

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purpose of that delivery must appear. Hence it appears that the validity of a contract written over a signature originally delivered in blank depends altogether upon proof extraneous of the instrument, and in many cases upon mere verbal testimony. And where evidence is given on one side to give validity to such a contract, counter evidence is proper on the other side to rebut it. The result is, that the whole subject rests in the outset in parole; and in this light it is uniformly treated in the books. It is also competent for the party to limit or qualify his liability at the time; and whatever may be the effect of a blank signature as it respects third persons, in case it is attached to negociable paper, yet, as between the original parties, their actual understanding and agreement is always to be regarded. This is abundantly shown even by the authorities cited by the plaintiff.

Where, as in this case, the signature is attached to an instrument already executed, and to which the signer is not previously a party, the presumption is that the signer intended to bind himself in some way in respect to the contract: and as he has left the terms of his contract indefinite by signing in blank, it is understood, in the absence of proof to be in any way or manner which the holder may elect. It is on this ground that the cases relied on by the plaintiff turn. Were this however a new question, we should have some doubt whether the circumstance of indorsing a note in this manner, instead of signing it did not of itself imply a collateral guarantee instead of a joint obligation. The subject however has been viewed otherwise in some of the states, and perhaps theirs is the better doctrine. But whatever may be the *prima facie* inference from such an indorsement, the question in this case is, whether parole evidence is admissible to explain it

From what has been said it is apparent that such evidence is admissible. Nor does this position impugne the doctrine that written contracts are not to be varied by parole; for here is no contract in writing—there is evidence of a contract of some kind, but its particular terms are not given on the paper but are left to be ascertained by parole. In accordance with this view of the subject are all the authorities; and to prove this, we must go no

farther than the authorities cited by the plaintiff himself.

In *Jocelyn* vs. *Ames*, 3 Mass. R. 274, parole proof was admitted; and the Court held that the plaintiff could not recover upon the contract which he had written over the defendant's indorsement, but that upon the facts proved, he was at liberty to write over it a different contract upon which he might recover, and the plaintiff took judgement by consent. This case shews that parole proof was admissible on both sides.

In *Hunt* vs. *Adams*, 4 Mass. R. 358, there was no question as to parole proof, but the question was what was the legal inference from the endorsement in the absence of proof. Upon a subsequent trial of the same case, see 5 Mass. 516; parole evidence was admitted, and it *was left to the jury to determine* whether the defendant's undertaking was absolute or conditional. In *Carver* vs. *Warren*, 5 Mass. 545, the plaintiff in counting on such an endorsement set forth the making of the note by J. C., and averred, that "the defendant, there afterwards by his writing under his hand on the back of said note, for value received, promised the plaintiff to pay him the contents of said note, agreeably to the tenor thereof." To this the defendant demurred. *Parsons*, C. J. says, "If, as has been suggested, the defendant endorses his name as a guarantor, and the present endorsement had been made, without his consent, or any authority from him, he should not have demurred, but should have pleaded the general issue and *on the trial he might have availed himself of this defence.*"

In *White* vs. *Howland*, 9 Mass. R. 314, parole evidence was introduced and the case was held to fall within the principle of *Hunt* vs. *Adams*. *Moies* vs. *Bird*, 11 Mass. R. 436, like *Hunt* vs. *Adams*, merely decides, that upon the indorsement alone, without proof to explain it, the indorsor may be treated as a joint promissor.

Nelson vs. *Dubois*, 13 John. R. 175, turned also upon parole proof explaining the indorsement.

If it were necessary to go further, we might refer to the cases in D. Chipman's Rep. 52 & 392, as cited by counsel in support of our decision.

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On the whole, we are all of opinion, that the judgement of the County Court is erroneous and must be reversed. The case is remanded for trial.

Manser, for plaintiff.

Briggs, for defendant.

CHITTENDEN, *January*, 1833.

ISAAC WARNER VS. THOMAS PATE & HENRY THOMAS.

If A. take a deed of mortgaged premises of the Mortgagor, after the law-day has expired, and exercises acts of ownership over the premises, keeping the Mortgagee out of possession, A., may be joined with the Mortgagor, as defendant in an action of ejectment to be brought by the Mortgagee to recover possession.

And in such case, A. is liable for *mesne* profits, if the land remains unredeemed.

This was an action of ejectment of Lot No. 77, in the Village of Burlington, mortgaged to the plaintiff by Pate, one of the defendants. Plea, General Issue. It was tried March Term, 1832.

The facts which then appeared are generally stated in the opinion of the Court; and here it is necessary merely to add that it appeared on the trial, that the plaintiff had obtained a decree of foreclosure at the then last January Term, amounting to somewhat more than $1000, and that the time to redeem would expire on the first day of May, A. D. 1832.

Upon the evidence, the defendants contended that the said Henry Thomas was not liable, and ought not to have been joined in the action, inasmuch as he was not, in legal contemplation the Landlord; and also, that if the said Henry Thomas was lawfully joined in the action he was not liable for the rents and profits, in as much as the notes of the plaintiff and the interest thereon had been secured to the plaintiff, by his decree of foreclosure, and inasmuch as the said Thomas had never received any rents or profits of said premises.

But the Court decided, that the said Henry Thomas was lawfully joined in the action, and was liable with Pate for the rents and profits from the commencement of the suit, no notice to quit having been shown.

To this decision of the Court, the defendants tendered their bill of exceptions which was allowed, and the case now comes here for consideration.

Allen for defendant, Insisted, that Thomas could not be joined with Pate in this ejectment, *barely as landlord*, for having taken a deed of the land in question from Pate. The Statute requiring the landlord to be joined with the tenant in ejectment, applies to those cases only where that relation is created by deed, and that of *record*; and so has always been the construction of that Statute by this Court: Stat. p. 84, sec. 88.

2d. An ejectment cannot be maintained unless there has been a disseizin by the defendant Thomas or an actual ouster of the plaintiff. Thomas was never in possession of the land claimed in this action; his taking a deed and putting it on record is no ouster of the plaintiff, was no disseizin by himself. Vide *Cooley* vs. *Penfield*, 1 Vt. Rep. 244.

3d. Neither will an ejectment prevail when it is brought against a servant, a lodger or mere trespasser or hired man. It must be brought against some one who is actually seized of the land and ousted the plaintiff claiming the title or possession. Vide D. Chipman, 215, *Jones* vs. *B. & W. Webber*.

4th.—Admitting that Thomas could be joined as landlord, nothing more than nominal damages could be recovered against him, as he was never in possession and took no part of the rents or profits of the land.

5th. The case finds that plaintiff had obtained a decree of foreclosure for the same premises, including the full amount of his principal and interest on the notes secured by the mortgage up to the first day of May, succeeding the rendition of the present judgement; and if he can recover rents and profits in this action he gets double damages against the defendants.

Maeck, for plaintiff.—Plaintiff was bound by the Statute to join the landlord as well as the tenant. Stat. p. 84.

2. Henry Thomas by the deed from Pate to him became landlord and Pate the tenant.

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3. Thomas and Pate were both in actual possession of the premises.

4. The decree could not have any bearing upon the ejectment, but whether a recovery in ejectment will open the foreclosure is a different question depending upon the peculiar circumstances of the case. *Booth* vs. *Booth*, 2 Atk. 234, Pow. on Mort. 1045.

5. But no question was raised as to the propriety of sustaining this suit.

6. If plaintiff is entitled to damages, he is entitled to recover of both defendants, and whether Thomas has received any portion of the rents and profits is wholly immaterial.

7. Plaintiff is entitled to damages in all cases where the notes and the interest would not be a compensation. *Atkinson* vs. *Burt*, 1 Aiken, 329.

The opinion of the Court was delivered by

BAYLIES, J.—There are two questions to be decided, 1st. was there a *misjoinder* of defendants? 2d. was Henry Thomas liable to pay for rents, and profits? As to the first question, it appears, that Thomas Pate was the mortgagor of the land in question to the plaintiff, on the 18th January, 1831; that one note of $200, which, by the condition of the mortgage, was payable to the plaintiff on the first day of May, 1831, was not paid; and by reason thereof the plaintiff became entitled to the possession of the land; but said *Pate* continued to hold possession, and, on the 17th May 1831, deeded the premises to Henry Thomas, who, shortly after, forbid the plaintiff ploughing the land, and threatened to prosecute him if he did. The said *Henry* Thomas ploughed the land, and Pate planted it.

From these facts, the plaintiff, has a right to conclude, that Henry Thomas was in joint possession with Pate; especially, when Thomas forbid the ploughing the land, and ploughed it himself—and there is nothing in the case, which, shows that Thomas subsequently abandoned this possession. If Thomas and Pate had joint possession, there was no *misjoinder* of parties in suing both. But if Thomas had not a joint possession with Pate; yet as he took a deed of the premises from Pate, who held possession by the ex-

press, or implied consent of Thomas, the relation of Landlord and tenant existed between them, and the plaintiff was justified in joining them in the action by the Statute, which says, "the action shall *in all cases* be brought as well against the landlord, or landlords, if any there be, as against the tenant or tenants, in possession of the premises demanded; and if any such action be otherwise brought, the same shall, on motion, be abated." The Statute does not say, that the tenancy shall be *for years, at will*, or *at sufferance*; but it says "*in all cases*," the action shall be brought against the landlord and tenant, or the writ shall abate. Whether in the case at bar, the writ would abate, if the landlord had not been joined, we are not called upon to decide; but we do decide, that the writ should not abate, because the action is brought against the landlord as well as the tenant.

As to the 2d question, it is observable, that if the money contained in the decree respecting the mortgage in this case, was paid to the plaintiff, he would receive the interest of his money from the 17th of May, 1831, when Pate deeded to Thomas, till 1st May, 1832, when the time of redemption expired.

But when judgement was rendered in the action of ejectment for *rents* and *profits* of the land, to wit, at the March Term of the County Court A. D. 1832, it was uncertain whether the *interest* would be paid—if it was paid when the time of redemption expired, there should be a deduction to the amount of the *rents* and profits, if the same were received by the plaintiff. The liability of Henry Thomas to pay the *rents*, and *profits* is settled by the case of *Atkinsons, adms.* vs. *Burt et al*, 1 Aik. 829.

Judgement of the County Court is affirmed.

CHITTENDEN, *December*, 1832.

R. & Z. TYLER vs. NATHAN LATHROP.

That an action upon a note, given for more than twenty dollars, but indorsed down to a less sum than that, is appealable.

That an *Audita Querela* is the correct remedy for the party aggrieved by the refusal of a Justice of the Peace to allow an appeal, when it ought to have been allowed.

This was an *Audita Querela*, brought to the County Court, and comes up on exceptions.

The only questions, presented in this case, are, whether the present complainants, the original defendants, were entitled to an appeal, and, if not, whether *Audita Querela* is the correct remedy. The action was brought upon a note for the sum of twenty-one dollars and seventy cents, bearing interest; on which there was an indorsement, reducing the sum due, to about seventeen dollars, for which the Magistrate rendered judgement. The defendants prayed for an appeal within the two hours allowed by law, and offered satisfactory bail. But the appeal was refused by the Magistrate, who supposed it not appealable, because the action was brought upon a note, and the judgement was rendered for a less sum than twenty dollars.

In the County Court, the defendant, Lathrop, demurred to the complaint, and it was adjudged sufficient, and the defendant excepted to the decision.

Argument for defendant.—The only point in this case is, whether the judgement was open to appeal, and it is contended it was not.

By the Statute, p. 139, appeals are restricted in cases on notes, if the notes shall not exceed the sum of twenty dollars.

The spirit and intention of the act evidently was, that no appeal should be allowed, when the judgement did not exceed the said sum of twenty dollars.

And this we contend is the fair construction of the Act.

In questions of jurisdiction, the Court are limited by the sum due.

Argument for plaintiff.—This case presents but one question for the Court to decide; and that is, whether the action in favour of the present defendant, against Plaintiffs, before justice Bliss, was or was not appealable.

It is contended by the plaintiff that they were entitled to an appeal from the judgement of the justice, because they moved for it within the two hours, tendered to the Magistrate his fee, and offered good and sufficient bail. And it appeared from the declaration and evidence, that the note on which the suit was brought was over $20, to wit, $21,70.

The Statute restricting the right of Appeal, in certain cases, provides, that no appeal shall be allowed on notes or settled accounts, if they shall exceed the sum of $20. The question then arises what constitutes a promissory note. Revised L. 139.

It is defined in the books to be a promise or engagement in writing, to pay a specified sum at a time therein limited, or on demand or at sight, to a person therein named, or his order, or the bearer. Chitty on Bills, 324; 2 B. Com. 467; Bailey on Bills, 1.

If this definition be correct, an appeal ought to have been granted, for the endorsement is not essential nor can it make a part of the note.

It is a mere receipt, or an acknowledgement of the payment of a certain sum, put upon the back of the note for the convenience of parties. It must be made subsequent to the note, and cannot effect it either in the manner, or time of payment, or its negotiable character. Bayley on Bills 25 & 27; 8 John, 379.

The note, at its execution, was certainly not within the restriction. And shall the plaintiff, by his own act, be permitted to take away the jurisdiction of the County Court, and the rights of the Defendants?

The Statute, granting appeals, has ever had a liberal construction; and the restriction a strict one.

The opinion of the Court was pronounced by

HUTCHINSON C. J.—We think the appeal ought to have been allowed. The Statute, see p. 139, allows appeals generally, and adds provisoes, one of which is, "that no appeal shall be allowed in any action, brought on notes or settled accounts, if such notes or settled accounts shall not exceed the sum of twenty dollars." This has no reference to the sum remaining due upon such notes, like the

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Statute, which regulates the original jurisdiction of Justices, of the Peace. The action is appealable, if the note, or notes exceed the sum of twenty dollars. Such was the case in this original action.

The defendant's Counsel suggested, in argument, that an *Audita Querela* was not the proper remedy, even if the appeal ought to have been allowed. But this Court have long since sanctioned this remedy. The party, entitled to an appeal, has a right to a hearing in the County Court, upon the merits of his cause. Of this he is deprived, by a refusal to allow an appeal. Moreover an appeal vacates, or at least, suspends, the judgement. By denying the appeal, the judgement remains in force, and execution issues. No other remedy was provided by our laws, till a late Statute, which allows a petition in the nature of an *Audita Querela*, but without its exact ceremonies, as a remedy for this, and some other cases, named in that Statute. The *Audita Querela*, as long used in such a case, is an apt remedy for such an aggreivance, because the party aggrieved is liable to execution, without having had his full day in Court; and because this writ may be made a supersedeas to such execution.

The judgement of the County Court is affirmed.

Adams, for defendant.

D. A. Smalley, for plaintiff.

CHITTENDEN, *January*, 1833.

ELEAZER GLASS vs. ROBERT BEACH.

In an action between A. & B.; A may give in evidence on the second trial of the action, what C. testified on the first trial—C. being now dead.

A moral obligation is a sufficient consideration for an express promise.

If a copy of a record be referred to in the Bill of exceptions as improperly admitted in evidence, and is not produced, nor shown to this Court, nor noticed in argument; this Court will consider the objection to the copy to be without foundation, and waived by the party making it.

This was an action of assumpsit founded upon a promise alleged by the plaintiff to have been made by the defendant to pay a certain debt due from the plaintiff's wife to Isaac Foote, jr. & Co. as by the declaration; to which the defendant pleaded the General Issue. On trial of the

cause before the Court and Jury after a statement by the plaintiff's attorney of the evidence which he proposed to offer, which was in substance the facts stated in the declaration, the defendant objected to to the introduction of the evidence on the ground, that it did not shew any consideration for an alleged promise. But the Court over ruled the objection and decided, that if the facts in the declaration were proved, they would constitute a legal and sufficient consideration. To prove the promise the plaintiff introduced Samuel Blin, Esq. who was the justice, who tried the cause below, who stated that one Wanton Wells, was a witness before him, that Wells had since died, and that after Well's death he reduced his testimony to writing, and is as follows.

That Robert Beach the defendant, on or about the 2d day of October, 1830, at Hinesburgh, agreed with Eleazer Glass, the plaintiff, to pay to one Isaac S. Foote, the sum of six dollars and fifty-one cents, and also all the costs that had then been made in a suit, said Foot vs. said Glass for the above sum of six dollars and fifty-one cents; and Beach did further agree with Glass to clear him of any further cost, or damages arising from the said suit. And further, that previous to this contract, Rossette Wells lived with Robert Beach some twenty or thirty weeks, and that he (witness) settled with Robert Beach for Rossette, his daughter's services, and that six dollars and fifty-one cents, which was taken up by the said Rosetta at Isaac S. Foot's Store, was brought in part pay by said Robert for the said Rosetta's services, (Rosetta is now wife of the plaintiff.")

To prove that Foot & Co. had sued the plaintiff and wife, and recovered payment, the plaintiff offered the copy of a record; to which the defendant objected, because it did not appear to be a suit against Glass and his wife, but against Glass alone. But the Court over ruled the objection, and admitted it. The plaintiff offered no other evidence of any execution or payment of the said Judgement. The defendant then called several witnesses to impeach the reputation of Wells for truth. And the plaintiff called several witnesses to sustain it.

The defendant contended, that, to prove the promise the

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plaintiff must produce at least one credible witness, and that the testimony of Wells being thus impeached, there was not before the jury sufficient evidence in law to prove the promise, and that there was no evidence of any consideration. But the Court directed the jury, that, if they believed the testimony of Wells, there was evidence of a consideration, and that if his testimony was true, the promise was proved, and they must find for the plaintiff. To this direction the defendant excepted. There was a verdict for the plaintiff.

Adams, for defendant, contended, 1st. The Court erred in their decision, that if the facts in the declaration were proved they would constitute a legal and sufficient consideration.

2d. There was no sufficient testimony before the Court, and the Court ought to have rejected it for insufficiency.

But even if the testimony of Wells was admissible evidence, it did not prove any consideration whatever.

Briggs, for plaintiff, contended as follows: The principal question in this case is, whether the consideration for the defendant's promise laid in the plaintiff's declaration be sufficient.

1st. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. I Kents Com. 2d ed. 465.

2d. Though it is in general true, that if the considera- be wholly past and executed before the promise is made, yet if the plaintiff's act is procured by the defendant's request, the promise is not a naked one, but couples itself with the precedent request. *Lampleigh* vs. *Brathwait*, Hob. 106; 1 Saund. R. 264, N. 1; 2 Kents Com. 465; Chitty on Con 14.

And that request may be implied from the moral obligation under which the party was placed; and the consideration must have been beneficial to the one party, or onerous to the other. *Livingston* vs. *Rogers*, 1 Caines, 584; *Comstock* vs. *Smith*, 7 Johns. 87; 2 Kents Com. 465.

The request may also be implied from the beneficial na-

ture of the consideration, and the circumstances of the transaction. *Hicks* vs *Buckhart et al*, 10 Johns. 243.

The opinion of the Court was pronounced by

BAYLIES, J.—In this action the plaintiff declared in substance as follows: That on the first of January, 1830, the defendant was indebted to the plaintiff's wife $10, for work and labor done and performed for the defendant, at his special instance and request, before her intermarriage with the plaintiff. And at the same time she was indebted to Isaac S. Foot & Co. in the sum of $6,51; and in consideration she deducted the sum from her account against the defendant, and discharged the balance, he promised to pay her debt to said Foot & Co.; but neglected to pay the same; and said Foot & Co. brought their action against the plaintiff and his wife for the said $6,51; but before judgement, the defendant, in consideration of the premises, undertook, and promised the plaintiff to pay said Foot & Co. the said $6,51, and save the plaintiff harmless; but neglected so to do; and the plaintiff had to pay said Foot & Co. $9,51, being the amount of damages and costs they recovered in their said action; so the defendant has not kept said promise, &c.

It appears that Wanton Wells, father of plaintiff's wife, testified for the plaintiff, before the Justice Court; and after the appeal, and before trial in the County Court, Wells died. His death being proved, it was consistent with the rules of law for the plaintiff to give in evidence, on the trial of this action before the County Court, what Wells testified before the Justice Court: It may be given in evidence, either from the judges notes, or from the notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person, who will swear from his memory to its having been given, *Mayor of Doncaster* vs. *Day*, 3 Taun. 262. In this case, there were no notes taken at the trial by the Justice of Peace, or by any body else; but soon after the death of Wells, justice Blin reduced his testimony to writing: it was this writing which was produced by Mr. Blin, on the trial before the County Court, who testified what Wells swore at the former trial. But the defendant, after

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the testimony of Well was given to the jury by Mr. Blin, undertook to discredit Wells, by the testimony of four witnesses, who said his character for truth was not good. And then the plaintiff called three witnesses, whose evidence tended to support Well's character: It was for the jury to say what credit should be given Wells, after hearing the witnesses for and against him. We consider the County Court did not err by instructing the jury, "that if they believed the testimony of Wells, there was evidence of *a consideration*, and that if his testimony was true, *the promise was proved*, and they must find for the plaintiff. Whoever reads the testimony of Wells in this case, must come to the conclusion to which the County Court arrived in their charge. The facts, that the plaintiff's wife, when she settled with the defendant, left in his hands $6,51, of her wages for him to pay over to Foote & Co., in discharge of her debt; and the defendant promising to pay the same, but neglected so to do, until Foote & Co. commenced their action against the plaintiff and his wife for said debt, were a *sufficient consideration* for the defendant's promise to pay the $6,51 to said Foote & Co., and to save the plaintiff and his wife harmless from costs in the action, which Foote & Co. had commenced against them. I consider, that the defendant, before he made this *express* promise, was under a *moral* obligation to do what he *expressly* promised to do; and this obligation, if there were no other inducements, was a sufficient consideration for the defendant's *express* undertaking. If the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration. 1 Tidd. 379; Cowper, 290; 4 Vt. Rep. 144.

We have not been furnished with the copy of the judgement, *Foot & Co.* vs. *Glass*, and not against *Glass* and *his wife*, as stated in the Bill of exceptions. We therefore consider that the objection to the copy, which was given in evidence of the jury, was probably made without foundation, and is now waived by the defendant, as he does not notice it in his argument. The judgement of the County Court is affirmed.

GUY CATLIN vs. JOSHUA AIKEN.

CHITTENDEN, *December*, 1832.

That a charge on the plaintiff's book, which makes the debit side exceed one hundred dollars, but which was made, or posted, by mistake merely, and which is made correct again, by credit of the same matter thus charged, does not take the jurisdiction from a Justice of the Peace and transfer it to the County Court.

That, when the plaintiff charges no interest on his book account, and nothing appears to render it certain, that he is entitled to interest, the jurisdiction cannot be affected by a supposed right to cast interest.

That, when there is no contract for the payment of interest on a book account, none is to be cast, except upon the balance, and that only from the time when said balance ought to have been paid.

This was an action on book account, appealed from the judgement of a Justice of the Peace to the County Court, and there submitted to an auditor, whose report is here inserted, so far as relates to any question of law, now litigated. There was a motion in the County Court to dismiss the action, on the ground, that the Justice had no jurisdiction, which was overruled, until the report of the auditor should come in. After that came in, the same motion was renewed, and overruled, and judgement rendered according to the report, for $58,50 in favor of the plaintiff. To this decision, the defendant excepted. The following facts were reported by the auditor, subject to the opinion of the Court upon the law arising upon those facts.

What was included in the report, and in the arguments, relating to a joint interest of the plaintiff and his brother, and relating to a bill of iron, is omitted, because the facts are so reported, as excludes every question of law connected with them.

The defendant contended, 1st. That the auditor could not act for want of a jurisdiction; the suit having come up by appeal from a Justice of the Peace, and the *debit side* of the plaintiff's account being more than one hundred dollars, to wit, the sum of $165,34.

The auditor found that the following was an exact copy of the plaintiff's Ledger, and the original charge on the Day Book, to wit:

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(LEDGER)

" Dr. *Aikens*, *State of New York*, Cr.

1824			By am't. of 2 Bbls.
March 29, To Day			Oil which is entered
Book, 207	$165,54		on my Book by M.
			Catlin, which is trans-
			ferred to his acc't, $66,50."

(DAY BOOK) p. 297,

"29 March, 1824—Mr. Aiken in York State, Dr.

To 64 galls Oil, last August, at 6s.	$64 00
To 2 bbls. - - - -	2 50
To Transportation of Flour, - -	1 50
Ap'l. *To 26 bbls. Rye Flour at* $3,75 -	97 54
	$165 54."

It was proved, that the three first charges, were made by Moses Catlin, in his hand writing, and that the last charge was made by Guy Catlin. It appeared, that Moses Catlin was in the habit of making charges for Guy and for himself on Guy's Book, and also that he made settlements for Guy, and for himself, and Lynde Catlin on the same Book.

2d. The defendant contended, that, from the foregoing facts it appeared, that the account was a *joint account* of Moses and Guy Catlin, and that the suit should have been in their names.

It appeared that the flower, charged by the said Guy Catlin, was manufactured at the Mill of Lynde Catlin, which was in the charge of Moses Catlin, and taken thence; but said flour was the property of Guy Catlin.

ISRAEL P. RICHARDSON, *Audt.*

Defendant's argument.—Is must be admitted, that the *debit side* of the plaintiff's book was *prima facie* over $100. And we contend that the Magistrate could not sit to enquire into the case, but was, *ipso facto*, ousted of jurisdiction.

The debit side of the defendant's book was *in fact* over $100. The deduction claimed by plaintiff's counsel, is not stated or claimed to be a mistake in the case, or on the plaintiff's Book, but is an ordinary credit on the Ledger,

and, from the appearance of the Day Book, it is evident, that it was not a mistake of either Moses or Guy Catlin.

1st. Even admitting that the amount credited, was charged by mistake, and hence that the action could have been maintained, yet it appears, that the debit side, less by that sum, was $99,04, and adding the interest accrued, was over $100.

Nothing will be presumed in favor of the jurisdiction of an inferior Magistrate as it is not general, but given, and limited, by particular Statutes. 4 Mass. 641; Revised Stat. p. 140.

Plaintiff's Argument.—1st. The plaintiff contends, that the debit side of his account is not over $100; that the charge of two barrels of oil on the 20th of March, 1825, at $66,50, is not a part of his account; that it was the property of Moses Catlin, and delivered by him to said Aiken; and also charged by said Moses on the plaintiff's book, without his, the plaintiff's knowledge; that, when the charge of the oil was discovered by plaintiff, it was immediately transferred by him as belonging to Moses Catlin aforesaid; that if any question is presented by the charge of the oil being thus made, it is a question of fact which has been settled by the auditor.

HUTCHINSON, C. J.—The principal question, to be decided in this case, is, whether the action ought to have been dismissed for want of jurisdiction. It was an action on book account, brought before a Justice of Peace; and carried to the County Court by appeal. The defendant there filed a motion to dismiss for want of jurisdiction, because the debtor side of the plaintiff's account exceeded $100. Its amount was $165,54, and there was a credit of $66,50. It seems the plaintiff contended, that his account was made to exceed $100 by the mistake of a charge in his favor of $66,50, which should have been charged in favor of Moses & Lynde Catlin, and his credit of that sum was merely a credit showing the same sum carried to the account where it belonged. The whole was submitted to an auditor, to take the account, and report the facts. He made his report, to said County Court, when the motion to

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dismiss was renewed. The Court refused to dismiss, and rendered judgement of the plaintiff for a balance of $48,50. To this decision the defendant excepted, and the action is brought to this Court, and has been argued upon that question.

On recurrence to the auditor's report, we find he has not found, in express terms, that the charge of $65,50 was charged by a mere mistake, and that the credit of the same sum, as it was made in account books, had corrected the mistake, and left the account as it should be. Such a report would have removed all difficulty, and restored the jurisdiction of the Justice as fully as if the mistake had never existed. We must not permit a mere mistake in charging, or posting, an item to take the cause from the jurisdiction of the Justice, where it would otherwise rest, nor a fictitious charge, to give jurisdiction to the County Court. See the case of *Brush* vs. *Hurlbut*, 3 Vt. Rep. 46. The auditor has reported the accounts of both parties, both debt and credit. By this it appears, that the defendant has given credit to Moses & Lynde Catlin for the same articles composing the $66,50, which the plaintiff had charged to the defendant, and afterwards carried to the account of Moses Catlin. He further reports the custom of Moses Catlin to make charges, in his own business, on the plaintiff's book; and further, that the original charge, now called a mistake, is in the hand-writing of Moses Catlin. We consider all this a sufficient report of facts, to show the charge of the $66,50 to be a mere mistake.

But it is urged, that the charges of the flour and transportation of the same, which form the real account of the plaintiff, amount to $99,04, and that this, with the interest upon it, exceed $100. This argument cannot be correct, unless it be first determined, that this demand certainly draws interest, like a note bearing interest. The plaintiff has charged no interest, in this case, and no fact appears, which renders it certain, that any interest ought to be allowed him, or, if any, for how long a time it ought to be cast. Interest is never to be cast on book accounts, unless by reason of some contract upon the subject, otherwise than upon the balance, and that only from the time when that balance ought to have been paid. As the plain-

tiff asks for no interest, and no fact, reported, shows him entitled to interest, there is nothing upon that score to affect the question of jurisdiction.

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The defendant's counsel has suggested that the action ought to have been assumpsit, because the account is joint, being in favor of Moses and Guy Catlin. But this is only true of the charge made by mistake, and not of the real account which leaves the question of jurisdiction the only question to be decided, and, upon that question the decision of the County Court was correct, consequently, we affirm that decision.

J. N. Pomeroy, for defendant.

H. Leavenworth, for plaintiff.

H. LOWRY VS. PHILIP WALKER.

CHITTENDEN, *January*, 1833.

Parol evidence is admissible to show the delivery of an execution to a Sheriff, and the time of that delivery, in order to hold property attached, although the officer make no minute on it of the time of serving it as directed by Statute.

An attachment made pursuant to the Statute of Nov. 6, 1817, gives a sufficient title to the officer to enable him to maintain trover, although he do not take actual possession.

Evidence is admissible as to the quantum of damages, although it consists of facts occurring after the commencement of the action.

In trover by a Sheriff, for property attached, proof of a fraudulent purchase by the defendant, of the debtor, of the goods in question is admissible as explaining his acts in intermeddling with the property.

This was an action of trover for a quantity of hay and grain in the straw, which had been taken by the plaintiff, as Sheriff of Chittenden County, upon sundry writs of attachment against one Elihu C. Barber in favor of several different creditors.

It appeared that the hay and grain were in stacks and in barns upon the farm of said Barber, and that said attachments were made by leaving copies at the Town Clerks office, and at the debtors house; but the property was not removed.

It was proved that judgements were recovered in all the actions, before the commencement of this trial, except in one at the suit of Emerson & Orvis in which judgement

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was rendered at the March Term, 1830, of Chittenden County Court.

It was shown by the officers receipts on the back of all the executions, except that in favor of Emerson & Orvis, that executions were issued and put into the officers hands within thirty days after the rendition of judgement. To prove that the Sheriff's lien had been continued on the attachment in favor of Emerson & Orvis, the plaintiff offered to show by parol evidence, that the execution was issued and delivered to the Sheriff within thirty days after judgement; to which the defendant objected; but the Court admitted the testimony.

The plaintiff having introduced evidence tending to show an actual conversion of the whole property, offered further testimony to show that before the attachment the defendant had made a feigned and fraudulent purchase of the property, with intent to defraud the creditors of said Barber, that he repeatedly claimed the property as his own after the attachment, and that when the Sheriff attempted to sell the property on the executions the defendant forbid him to sell, claiming the property as his own. To this defendant objected, but the Court admitted the testimony. The defendant requested the Court to charge the jury, that the plaintiff could not maintain this action without having taken actual possession of the property, but the Court charged that the plaintiff's possession acquired by virtue of the attachment was sufficient.

The defendant took exception to the decision of the County Court, and on these exceptions the case came before the Supreme Court.

Adams, for defendant.—1st. There was no sufficient evidence of possession in plaintiff to enable him to sustain this action.

2d. There was no legal evidence of a conversion by defendant.

3d. The evidence relative to the purchase by defendant, of E. C. Barber, was irrevelant and and ought not to have been admitted.

The evidence relative to the execution of Emerson & Orvis was illegal.

Marsh for plaintiff.—The exceptions raise but one question which was not determined in this case at the last term of this Court, viz: whether the Court erred in admitting evidence that the defendant had made a fraudulent purchase before the attachment, with intent to defeat the rights of the creditors, and had afterwards justified the purchase to be good by claiming the property and forbidding the officer to sell.

It is not contended by the defendant that the testimony by which these facts were established was insufficient or incompetent in itself to prove those facts, and the objection is therefore to the evidence itself, and not to the mode of proof.

1st. We need not perhaps enquire whether these facts alone would prove a conversion, because the case shews that an actual conversion of the whole property was proved by other evidence, and the evidence in question was introduced merely to show that the pretended right of defendant to control the property was founded on a fraud, and therefore could not avail. The real force of the objection is that the plaintiff in his testimony in chief, undertook not only to make out his own case, but to destroy the defence which would probably be set up; and so, not that he did not prove enough, but that he proved too much. But if it be necessary for us to show, that the evidence tended to prove a converson, we rely one these cases, *Gibbs* vs. *Chase*, 10 Mass. Rep. 125; *Bristol* vs. *Burt*, 7 John. Rep. 254; 3 Starkie on Evid. 1493, *Nichols* vs. *Newton*, cited in note; *Baldwin* vs. *Cole*, 6. Mod. 212; *Cowlie* vs. *Davis*, 6 East. 538; *Reynolds* vs. *Hende*, 5 Cowen 323; *Shipwick* vs. *Blanchard*, 6 T. R. 298. Nor does it alter the case, that here the purchase was before the attachment; for the defendant's claiming under that purchase afterwards was a revival and renewal of that tortious act.

2d. But admitting that this evidence did not tend to prove a conversion, yet the defendant is not therefore entitled to a new trial. The case shows that the conversion was established by *other* evidence, and that evidence must be taken to be both competent and sufficient, because it was not objected to. It does not appear that the Court

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charged that the evidence which was objected to was sufficient, or that they were requested by the defendant to charge at all on the subject. Every presumption must be in favor of the verdict. See *Adams* vs. *Ellis*, 1 Aiken, 24; *Stearns* vs. *Warner*, 2 Aiken, 26.

PHELPS, J.—It is insisted in this case, that parol evidence is not admissible to prove the issuing of the execution, in the suit of Emerson and Orvis and the delivery of the same to the Sheriff, for the purpose of shewing, that the Sheriff's lien on the property continued till the time of the conversion. Were this a new question, we should have no doubt of the legality of such evidence to establish the point, inasmuch as the issuing of execution and the delivery to the Sheriff are mere matters in pais. The record, generally speaking, terminates with the judgement; and although in some cases, the execution and return are treated as matters of record, as in case of a levy of lands, yet the facts to to be proved in this case, are not, from their nature, susceptible of proof by record; the execution itself shews not when it was issued; it has a date, but in this case, even that furnishes no evidence when it was issued; and as to the delivery to the Sheriff, it is a fact as foreign to the record as any fact imaginable. The minute directed to be made by the officer, of the date of the reception of the execution, is intended for the benefit and security of others, and not for his; and should such minute appear on the execution, it would, by no means, be conclusive in his favor. If such minute could be falsified by parol, it might be supplied by parol, for wherever record evidence is required, it is conclusive in its nature.

It is to be observed, that the suit in the present instance is in favor of the officer, and to require a minute on the execution, in such case, would be nugatory, as it is in his power to make such minute at any time, and antedate it to suit his convenience.

This question has however been repeatedly decided.—See *Lowry* vs. *Stevens*, in this County, Jan. Term, 1832, and *Fletcher* vs. *Pratts*, Windham County, 1832. It is forther urged, that the plaintiff cannot maintain this action by virtue of his lien, for want of an actual possession

of the chattles in question. It is unnecessary to discuss the doctrine of the common law on this subject. Whatever it may be, it yields of course to legislative enactment. The statute of Nov. 6, 1817, provides that attachments made like the one in question, "shall be as effectual to hold said property, against all subsequent sales, attachments, or executions, as if said property had been actually removed and taken into the possession of the officer.

As to the execution in favor of Emerson & Orvis, it was clearly admissible as affecting the measure of damages.— It was not admitted to establish the right of action—that being sufficiently established by the proceedings in the other cases. It is a settled rule, that, the right of action being established, evidence as to the measure of damages is admissible, although it arise after the commencement of the action. This evidence was also proper, as shewing a continuance of the plaintiff's lien.

Another exception is taken to the admission of evidence to show a fraudulent purchase by the defendant from Barber, of the property in question. The case does not show what use was made of this evidence; but if it were pertinent to any purpose, it was clearly admissible.

The case states, that evidence was given tending to show an actual conversion; and it would seem that the evidence objected to was introduced in connection with that. In this point of view, it was undoubtedly proper, as explaining the acts of the defendant, and determining their legal character and effect. The declarations of a party accompanying his acts are admissible to explain those acts. This evidence was not of itself sufficient to prove a conversion, nor was it so treated by the Court; but, in one event, it might be very important. Upon a question whether an actual conversion of a part should be deemed a legal conversion of the whole property, evidence of this character might have an important bearing. The evidence was therefore admissible. Had any improper bearing been given to this evidence, the case should have shown it. As nothing of this kind does appear the judgement must be affirmed.

CHITTENDEN, *December*, 1832.

C. M. HUNTINGTON vs. B. BISHOP Trustee of E. SPOONER.

A trustee of an absconding debtor has no right to a trial by jury as to the question whether he has effects or not.

Nor a right of review from a judgement that he has effects.

Other evidence than the disclosure is admissible to charge the trustee. So his disclosure may be contradicted.

This was a trustee process brought against Bishop, under the statute, charging him as trustee of one E. Spooner.

The trustee (Bishop) having filed his disclosure, claimed a trial by jury. This was denied by the County Court.

From the disclosure and other evidence adduced upon trial, it appeared, that in January, A. D. 1827, the said Huntington and Spooner were jointly concerned in running a line of stages between Burlington and Richmond, on the line between Burlington and Boston, and transporting the mail and passengers on said line, in connexion with other proprietors to the eastward—that on the 23d of January, 1827, Bishop, the trustee, purchased of Spooner his interest in the establishment, consisting of sundry horses, carriages, harness, &c., with the right to receive a certain portion of the mail money, which Spooner represented to Bishop he had the right to receive, by agreement with the other proprietors. The interest of Spooner in the visible property, was estimated at one hundred dollars, which Bishop paid him; and the "privilege of the road," at four hundred, for which Bishop gave Spooner two notes of two hundred dollars each which still remained unpaid. Bishop commenced running the stages, but immediately after, Huntington refused to be connected with Bishop, or to permit him to intermeddle with the business, alleging, that by agreement between himself and Spooner, neither was to sell out until the joint property was paid for: they having executed their joint notes for the same, when they purchased. Upon this, Bishop applied to Spooner, then at Woodstock, who promised to come over and see him put in possession of the privilege; but instead of doing so, left the state.—That Bishop never run the stage afterwards, but sold the visible property to I. D. for seventy-five dollars, and gave up to him the privilege of the road, mail money, &c., upon his (I. D's) undertaking to indemnify

him (Bishop) against the notes above mentioned. Bishop contended on trial that Spooner had deceived him, and obtained the notes by false representations, and that he had never received the consideration for the notes. It did not however appear that Spooner had not the interest in the line which he represented, but it did appear, that, in consequence of Huntington's refusal to run in connexion with Bishop, he did not enjoy the purchase as he expected. In the course of the hearing, testimony was offered by the plaintiff extraneous of the trustee's disclosure, which was objected to by the trustee, but admitted by the Court.

The Court decided, that Bishop had effects of the principal debtor, and was chargeable as trustee.

The trustee moved for a review, which was denied. He therefore took his exception, 1st, To the decision denying the trial by jury,—2d, To the finding on the facts adjudging him chargeable, and 3d, To that denying the review.

Maeck for the trustee.—By the bill of exceptions, three points are presented for the decision of the Court: First, Had the trustee the right of review? 2d, Did the Court err in admitting testimony to impeach the trustee on points where he had been specially interrogated? 3dly, Had the trustee the right of having his disclosure tried by a jury?

1, The defendant was entitled to review his cause. The right is given to him by the express words of the statute. The act of 1797 gives the party in all cases the right of review, except in certain cases mentioned in the act; and the act of 1824, R. L., p. 122, remodelling the Supreme and County Courts, expressly enacts, "That either party may once and no more review his cause to the next term of the County Court," except the judgment was by default, or twice for the same party. The right being general and extending to all cases where the County Court has jurisdiction or did have jurisdiction at the passing of the act, it follows that the party had the right of review unless that right was taken away by some express statute; and no such statute exists.

2. Evidence to contradict the answer of the trustee was improperly admitted.

CHITTENDEN, *December*, 1832.

Huntington vs. Bishop.

It is an undisputed rule of the common law that a party shall not be admitted to impeach his own witness. The right in the present case is claimed by virtue of the phraseology of the statute. In 15 Mass. R., p. 205, it is said by the Court, that "Statutes made in derogation of the common law are to be construed strictly; and they are not to be construed as taking away a common law right unless the intention be manifest." The question then is, did the Legislature intend to say that the party might use, and then abuse his witness? If then any sensible effect can be given to the clause "or by other proof," on the 151st page of R. L., without destroying the common law doctrine, the Court will do it. We contend that the only effect to be given to that clause is to admit the plaintiff to introduce testimony to charge the trustee, only in cases where the trustee, by the rules of the law, is not bound to answer; or where, from want of information, he is unable to answer.

In 2 Mass. 96—4 Mass. 81, 85, 272—5 Mass. 49, and 11 Mass. 90, and 8 Pickering 67, it was decided that other evidence could not be admitted. In 13 Mass. 104, it is decided that the trustee is under no obligation to answer whether the claims he wishes to offset against his principal are usurious, and therefore void. So that he is under no obligation to answer whether the conveyances he has received of his principal are fraudulent or not. Suppose the claim of the absconding debtor against the trustee to be barred by the statute of limitations, would the trustee be compelled to answer whether he had not revived the debt by a new promise? Or again, suppose the debt Spooner held against Bishop was a judgment and jail bond given on the execution, would Bishop be compelled to answer whether he had broken the bond? It is believed that the Court would protect a trustee from the consequences of such disclosures, and yet in these cases and those of another class we are about to allude to, the Massachusetts Courts refuse to admit other evidence, though the evidence may not tend to impeach the trustee's disclosure, but merely to supply deficiencies in the disclosure. They hold the judgment of the Court must be on the disclosure of the trustee alone. We contend that that the clause "by other proof" was wholly intended by the Legislature to apply

to cases similar to the foregoing, where the trustee still remains shielded by the policy of the law from answering, or to the following class of cases where he may be unable to answer. If the dealings between the trustee and his principal were matters of account, it might be out of his power to state the absconding debtor's amount against him, and yet in the power of plaintiff to prove it. Suppose the liability of trustee to arise upon the ground that he was an indorser, and payee has failed: To entitle indorsee to recover against his indorser it is necessary for him to prove affirmatively a demand of payment on payee, or some legal excuse for not demanding payment. Now the trustee may not know facts enough to say whether he was liable or not, and yet it might be in the power of the plaintiff to prove it affirmatively. There are so many cases for this clause of the statute to attach without derogating from the principle of the common law. that it is believed the Court will say it never was the intention of the Legislature to derogate from the common law, but only places it in the power of the creditor to prove his case by other testimony if the trustee was legally or in fact incompetent to put the Court into possession of the necessary facts.

3dly, Was the trustee entitled to a jury trial? We contend that he was entitled to a jury trial, and that the right is guaranteed both by the constitution of the United States and the constitution of Vermont. The 9th article of the amendments to the United States constitution provides, that in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved. And the second clause of the 6th article declares among other things, that "This constitution shall be the supreme law of the land." No state can exercise sovereignty, and no court can administer justice contrary to the letter and spirit of the constitution. It is the fundamental law of the empire. Most of the provisions of that constitution, we admit, refer to United States in their collective capacity, and to the power of making and administering laws as officers of the United States. But there are some general provisions which may be considered as declaratory of the rights and privileges of the people, considered not merely as citizens of the United States, but as cit-

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izens of the respective States. Thus, that they shall have the right of trial by jury—that they shall be protected from warrants, unless issued with certain limitations, are general provisions which bind not only the legislative powers of the United States, but the legislative powers of the several States. But whether this provision refers to, and binds the legislative and judicial powers of the respective States, still we contend that the right of trial by jury is clearly preserved by the constitution of Vermont.

The 12th article of the bill of rights declares, "That where an issue in fact proper for the cognizance of a jury is joined in a Court of law, the parties have a right to trial by jury, which ought to be held sacred;" and the 31st section of the constitution declares that "Trials of issue proper for the cognizance of a jury in the Supreme and County Court, shall be by jury." This language, with a proper view of issues proper for the cognizance of a jury, will admit of no misconstruction. By the common law, which, by legislative enactment, is made part of our code, issues of fact are to be tried by the jury—issues of law by the Court: And the instance is not to be found in England where the issue is purely a matter of fact, and decisive of the merits, where the party can be deprived of a jury trial. The constitution limits the right to Courts of common law, which is the case here. It may be said that the practice has been different, but no length of practice can nullify the constitution. Practice to-day, does not become precedent to-morrow. If there is any doubt, it should be solved in favor of trial by jury.

1st, Because the framers of the United States constitution and of the constitution of Vermont have shown by their affirmative declarations an extreme anxiety to preserve and extend the right of trial by jury.

2d, Because they are the best and most natural triers of fact.

3d, Because it was in contemplation between Bishop and his principal, at the making of the contract, that if a controversy should arise out of it, it should be determined by a jury; and Bishop cannot have the matter tried by a jury unless tried in this action.

4th, Because the right of trial by jury is in accordance

with the genius and feelings of the people, and should not be abridged on any account whatever.

Lastly, Is the trustee liable on his disclosure? We contend he is not.

1st, From the fraud of Spooner in the inception of the contract.

2d, The consideration has failed.

3d, The contract was rescinded by the mutual agreement of Bishop and Spooner before the present plaintiff's rights attached. The establishment of either of these positions is decisive of the case.

The first point is too well settled to need either argument or authority to fortify it. The case shows both a false representation and concealment of material facts. Good faith is essential in all contracts, and false representations receive no more countenance at law than in equity.

The consideration of the notes now in question has wholly failed, so far as the privilege of running the stage and receiving the mail money formed the consideration of the notes in question; and it has been of no benefit to Bishop. This part of the contract was executory at the time, and Spooner has failed to execute it. It was a condition precedent on his part. The circumstance of B's running the stage over into Burlington is of no consequence, and if it were to be treated as of any importance, still the consideration has partially failed, and yet the judgment is for the full amount of the notes. The defendant had the right to avail himself of a total or partial failure of the consideration.

The contract was rescinded by the mutual agreement of parties. It is not necessary to put this case upon the general doctrine of the right of a party to rescind his contract. The right and power of both parties to rescind their contract must be as perfect, as to bind themselves in the first instance. So far as respects the notes in question, it was rescinded by the mutual agreement of both parties.

Briggs for the plaintiff.—In this case the trustee made his disclosure agreeably to the statute, and after a trial the Court adjudged him trustee to the amount of the notes in question. The trustee claimed to have a trial by jury, which was refused.

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1. The plaintiff contends that the plain language of the statute, and the uniform usage of the Courts in this State, have confined trials under the trustee act to the Court. If any question arises whether chargeable or not, it is upon facts disclosed by the trustee himself; and therefore nothing is left for the action of the jury. So the matter is treated in other states having statutes similar to ours. 6 Dane's Dig. 498.

2. Proceedings under the trustee act, and the act itself, do not depend upon the principles of the common law, but are deviations from it; and therefore not subject to the 12th article of the constitution of Vermont.

3 They are in their intrinsic nature Chancery proceedings—the declaration being a bill; the disclosure the answer; and the trial similar, except that the testimony is taken *viva voce* instead of being written; and when fully made up, the Court decide upon the whole case. If this statute did not exist, Chancery would give a remedy in all cases proper for its application—with the difference only of greater delay and expense: and most of the other states have statutes like ours prescribing a similar mode of trial. These views obviate the argument drawn from our constitution, and the 9th amendment of the constitution of the United States.

4. The bill of exceptions having stated the evidence objected to, as immaterial to the issue, it is as immaterial to inquire whether it was properly or improperly admitted. There is an obvious difference between admitting improper evidence to a jury, when the effect it may have, cannot be ascertained, and to a *Court* who declare it to have been impertinent, and that it was laid out of consideration.

5. It is clear that the trustee was not entitled to a review. The proceeding against trustees, is not a civil cause in the sense of the statute—Rev. Stat. p. 581—being merely a mode of making a legal application of the debtor's intangible effects upon his creditor's debt with safety to all persons concerned. If the trustee admits himself such, the Court directs the application as a matter of course. If any question is made whether liable or not, it is upon trustee's own disclosure, which is not to be varied even by the ingenuity of our opponents. If dissatisfied with the judgment of the

County Court, the trustee can appeal to the Supreme Court; but here again, their judgement is founded upon the same unalterable facts. No one reason on which the privilege of review is founded has any application to such a case.

The opinion of the Court was pronounced by

PHELPS, J.—It is insisted in this case that the Court below, in denying the trustee a trial by jury, has denied him the enjoyment of a right guaranteed to him by the Constitution. The sacred regard which should be entertained by all our judicial tribunals for the provisions of that charter, from which all the powers of government are derived; the great importance, attached to the trial by jury, and the scrupulous care with which it is guarded in all our Constitutions, renders this question one of serious import. Whenever this right is denied, it becomes us carefully and seriously, to examine those instruments and see whether any of its provisions have been disregarded.

The trustee in this case predicates his right upon the 9th Act of the amendment to the Constitution of the United States. That article provides, "that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law."

It is very doubtful whether this article has any reference to the proceedings of the State Courts. These articles of amendment, were proposed by Congress, after the Constitution was adopted. The resolution of that body, proposing the amendments, assigns a reason for the proposal, "the desire" of the conventions of several of the States, at the time of the adoption of the Constitution, "in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." It is apparent that the object of this article was, to prevent "misconstruction or abuse" of the powers conferred by the Constitution, and for that purpose this "restrictive clause" was added. It was designed as a check upon the General Government. It does not, in its terms, apply to

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the State Governments, and was introduced, as appears by the preamble just quoted, with reference solely to the Courts of the United States. The article itself affords evidence of the same truth. The restriction upon the re-examination of any fact tried by jury is limited, in terms, to the Courts of the United States. This restriction was most obviously necessary to render the article perfect, and fully to secure the right in question; and if the former clause was intended to have any bearing upon the jurisprudence of the States, no possible reason can be assigned why the latter clause was not thus limited. It may be added, that no control is given to the general government, by the constitution, over the jurisprudence of the States; and such a restriction, as a measure of precaution against the "abuse of its powers," was wholly unnecessary. Moreover, had it been intended as restrictive of the States, it would neither have been introduced with such a preface, nor concluded in the same language. The provisions of the instrument, intended to be restrictive upon the States, are so in terms.

But conceding, for argument's sake, that the article in question has reference to the Courts in this State; the question arises, what is the import and true construction of the article?

In the first place, the provision is confined to suits "*at common law.*" It would be difficult we apprehend for the trustee to make out, that this is a proceeding at common law. It is a proceeding under a statute, authorized and regulated by statute, wholly unknown to the common law, and existing no where except by statute.

In the next place, the enactment is that "*the* right of trial by jury shall be *preserved.*" Here a known pre-existing right is spoken of—a right established and regulated by immemorial usage—a right existing at common law, and "preserved" in all cases, where the proceedings are according to the course of the common law. There is no attempt to create or extend a right, but the obvious purpose is to preserve and secure this right, in all cases, where, by the course of proceeding, it is the appropriate mode of trial. It would certainly do violence to this article, so to construe it, as to prohibit all Chancery proceedings, all

proceeding in Probate, or Prize Courts—and in short all the various proceedings, in the administration of justice, which take place without the intervention of a jury. The next effort is to predicate this right upon the Constitution of this State. That constitution is merely declaratory of this right, "when any issue in fact, proper for the cognizance of a jury, shall be joined in a Court of law." The proper construction of this article leads to the same result. It declares, that "the parties *have* a right to trial by jury, &c., evidently referring to a preexisting right, well understood, and well defined; and as existing, in all cases, "proper for the cognizance of a jury." This last clause is a direct reference to the usages and practice of the common law. Unless this be understood, and the right intended is understood to be such as had been before enjoyed, the article is nugatory. If every successive legislature is to determine for itself what is proper for the cognizance of a jury, the article is of little value. The result is, that the right is secured by this article, only so far as it is sanctioned by established usage, and where, from the nature of the issue, and the course of proceeding, the trial by jury is the appropriate mode. In conformity with this construction, has been the whole course of our legislation and jurisprudence since the adoption of our Constitution. We have had our Chancery proceeding, our Probate Courts, and even our action of account, and book debt, operating from day to day, without dreaming, that all this was a gross violation of the Constitution, which is now discovered to have secured to the parties a trial by jury in all controverted cases.

This leads me to enquire whether this is a case proper for the cognizance of a jury. If it be so, then indeed the right contended for is guaranteed by the Constitution.—And this enquiry involves the nature of the action, and its analogy to other proceedings, with respect to which the right of trial by jury has never been the subject of debate.

This suit as between Huntington, the plaintiff, and Spooner, the principal debtor, is purely a common law proceeding; and the issue between them is doubtless proper for the cognizance of a jury. But the proceeding against the trustee is a mere incident to the principal suit. This

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proceeding as already observed, is a creature of the Statute, a part of the attachment law; and the object of it is merely to secure the estate of Spooner to respond the judgement which may be recovered in the principal suit. The Statute styles him, a trustee, and at the same time makes him so, or perhaps more properly changes the *cestui qui trust*, and transfers the use from the principal debtor to his creditor. After the service of the process, the trustee becomes a sort of stake holder, a depository of the effects for the party ultimately entitled to them. He is considered as holding in trust, subject to the direction of the Court. In conformity with this view, he is treated like a trustee—he is called upon to disclose under oath, as to the effects in his hands, and the trust is enforced precisely as it would be in Chancery. His rights are no farther involved than those of any trustee, nor indeed farther than are necssarily so in the execution of a trust.

From this view of the subject it is clear that this proceeding bears no analogy to any proceeding at common law, but is analogous in all respects to a proceeding in Chancery. Unless then the Constitution of this State secures to the party a trial by jury, in every case of disclosure or answer upon oath in Chancery, it can hardly be extended to the case in question. Nor is the issue (if issue it can be called) proper in itself for the intervention of a jury. There is an absurdity in submitting to a jury the determination of facts, supposed to be locked up in the breast of the party, and where the principal if not the only evidence is his disclosure upon oath. If as in a neighboring State no evidence is received to contradict the disclosure, a more rediculous farce than a trial by jury can hardly be imagined.

The only remaining enquiry on this part of the case, is, whether a trial by jury is given by the Statute. It is remarkable, that the Statute authorizing this proceeding has no allusion to any such trial, but its language throughout seems to contemplate a trial by the Court. Rev. Laws, 349.

Some of its provisions, particularly the 3d section, are inconsistent with the notion of a trial by jury. If such mode of trial was contemplated, it is strange that no provision should be made in relation to it.

We are by no means anxious to engraft, by force of construction, this mode of trial upon the trustee process. To do so would be to render the proceeding tedious, and embarrassing, and moreover seriously expensive; and what is still worse, defeat the very purpose of the Statute, by consuming the effects in protracted litigation. We are therefore of opinion that the County Court did right, in refusing a trial by jury.

The next exception is taken to the decision of the Court, in admitting other evidence than the disclosure of the trustee, in order to charge him. If the analogy, supposed to exist between this proceeding, and a proceeding in Chancery, do actually exist, so far as that analogy would serve to determine the points, it certainly tends to support the decision of the Court. In all cases, where it is attempted to enforce a trust in Chancery, the rules of that Court admit other proof than the answer to establish it.—Unless then, the Statute regulating the process confines the proof to the disclosure alone, it would seem that the usual mode of proof, in analogous cases, should be adopted. The Statute however has no such restriction. On the other hand, it is only at the election of the plaintiff, that the trustee is examined upon oath; (see sec. 4,) evidently implying, that his disclosure is not the only legal evidence; and the expressions "or other evidence" as used in the 4th & 5th sections of the act evidently contemplate proof from other sources.

The supposed hardship on the part of the trustee, in subjecting his disclosure to contradiction by extraneous evidence, is rather imaginary than real. In ordinary cases of contested right, the party is denied the privilege of his own testimony. He is placed, by the course adopted in this case upon the same footing as if called to disclose by process in Chancery; and enjoys the advantage of having his disclosure taken as true until disproved. On the other hand, to treat his disclosure as conclusive, would introduce an anomaly in the law, and tend to jeopardize his own integrity as well as the rights of his adversary.

We are aware, that in an adjoining State a different rule has obtained, in their practice under a similar Statute. To the authority of their decisions, however high it

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may be, it is suffieient to oppose the uniform practice of our own Courts, since the existence of the Statute.

Another ground of exception is, that the Court below erred, in holding the trustee chargeable upon the facts stated.

The trustee insisted in that Court, that the notes given by him to Spooner were not legally due. 1st. Because they were obtained by misrepresentation; and 2ndly, because the consideration had failed.

As to the first ground, it is sufficient to observe that there was no evidence of any misrepresentation. So far as appeared, Spooner was the owner of the property which he represented himself to own. And as to the second it appeared that the property actually passed to the trustee. The only difficulty arose from Huntington's refusing to be connected with him in business, and this was a matter beyond Spooner's control, and for which he was not responsible. Another answer may be given to this defence.—Bishop, finding difficulty in conducting the business, sold out to J. D., who paid him $75, for the visible property, and agreed to indemnify him from the notes in question, and it did not appear that J. D. experienced any difficulty in enjoying the privilege. It is right therefore that J. D. should pay for the property, and he must be compelled to it, in the only practicable modes, viz. through his indemnity to Bishop. As to the latter, the whole subject of a failure of consideration consists simply in a loss of $25, on the re-sale of the property.

We come now to the fourth and last ground of exception, viz: the denial of the right of review. This right is claimed by force of the judiciary act of 1797, and the supplementary act of 1824.

It is to be observed that the first act has, previous to the provision for a review, no reference nor allusion to any matter or proceeding, not within the ordinary common law powers of a Court of general jurisdiction. The right of review there given, is evidently referable to such suits or actions as might by the rules of the common law be sustained in such Courts, and where the proceeding is according to the course of the common law. The act has no reference to any anomalous proceeding, created and regu-

lated by particular statutes. It is further to be remarked, that the "trustee act," as it is denominated, was not then passed; and it is not to be inferred, that the review was intended to be extended to a proceeding then unknown to our laws.

The act of 1824, on the same subject, has reference to actions of the same description, and is in effect merely a restriction of the right given by the earlier statute. This proceeding is governed exclusively by the trustee act; and it is not to be supposed that the Legislature intended to subject a proceeding, created by special statute, and regulated by such statute throughout, to the operation of the law which has reference to the ordinary common law jurisdiction of the Courts.

With respect to the trustee act, it contains no provision for a review; but on the contrary, all its provisions seem to exclude it.

Further, this proceeding being in the nature of a Chancery proceeding, the right of review, as given by statute, is hardly applicable to it. If it were allowed, it would carry with it as a necessary consequence the right on the part of the trustee to vary his disclosure, tempting him to vary it according to the exigencies of his case, and thus putting at hazard the administration of justice.

Finally, the proceeding against the trustee being merely preliminary to the trial of the principal suit, to admit the right of review, which must necessarily be mutual, and expose the parties to the consequences of three trials with the trustee, and perhaps as many more with the principal debtor, involving a ruinous waste of time, and money, and defeating the very purpose of the act—would be giving to the act a construction and an effect which we are satisfied the Legislature never intended.

The judgement of the County Court is affirmed.

CHITTENDEN, *January*, 1831.

ZEBULON MACK vs. JAMES H. NICHOLS.

A. seized and sold property on an execution in his favor against B.—C. sued A. for the same, and while his suit was pending, agreed with A. to discontinue it, and release his claim. The suit was discontinued, but afterwards C. commenced another suit against A., and recovered the value of said property. Whereupon, A. sued C. upon his said agreement for a discontinuance and release, and recovered back of C. the same amount which C. had recovered of him. Upon a *scire facias* brought by A, for an *alias* execution against B., on the ground of a failure of title in the property sold as aforesaid. *Held*, that the plaintiff was entitled to recover.

This was a *scire facias* brought to obtain an execution against the defendant, on the ground that the property which was seized and sold on the original execution belonged to another. The defendant interposed two pleas in bar, the substance of which is sufficiently set forth in the argument of counsel, and decision of the Court for a full understanding of the case. The plaintiff demurred generally. In the County Court the demurrer prevailed, and the case comes to this Court by an appeal entered by the defendant.

Argument for defendant.—The question presented by these pleadings, is whether the facts set forth in the defendant's plea, show "sufficient cause why an *alias* execution should not issue against" the defendant.

The present action is *scire facias*, to obtain an *alias* execution against the defendant, because the property sold on the original execution proved to belong to one Jonathan Snyder, and not to the defendant. It is admitted by the pleadings, that a yoke of steers were sold on the original execution, as the property of Nichols; that Snyder afterwards brought a suit against Mack and the officer for the same steers, and recovered in damages and cost $98,20; and that afterwards the plaintiff, in a suit against Snyder, on an alleged contract "that in consideration that the said Zebulon would agree that a suit" then pending in Chittenden County Court between Snyder & Mack for the steers, "should be discontinued, the said Jonathan agreed that said Mack should be released from all and every claim for said steers," recovered a judgement against Snyder for $98,20, being the amount of the damages and cost which Snyder had before recovered against Mack and the officer;

and that Snyder had paid the amount of said judgement, and that Mack still retains it.

A *scire facias* is a judicial writ, in the nature of an appeal to the equitable jurisdiction of the Court for relief, and issues to bring under its review, cases in which the *regular* process of the law is suspended, or rendered incompetent to enforce a subsisting judgement. The statute does not prescribe to the defendant specific technical defences, but leaves him at liberty to show any "sufficient cause" why the plaintiff should not recover; and the defendant contends, that when the facts shown, do demonstrate that the further enforcement of the prior judgement would be grossly iniquitous in the plaintiff, "sufficient cause" is shown, and the Court are at liberty to arrest its operation. Now it clearly appears that the plaintiff's action against Snyder was to recover back the amount of Snyder's judgement against him and the officer. Snyder paid that judgement, and has ever since acquiesced in it. Nor is it now in the power of Snyder to wrest this money from the *plaintiff*, by *Audita Querela* which does not lie to set aside an execution and judgement extinguished by payment; or by writ of error, which is prohibited, or by any other process known to the law. He obtained *payment* of his execution against Nichols, and he cannot prosecute further his claim against the defendant, in analogy to the common principle that a voluntary payment by A. of B's debt to C., without the knowledge or consent of B., extinguishes C's right of action.

Should it be objected that defendant cannot avail himself of the plaintiff's judgement against Snyder, on the ground that it is *res inter alios actæ*—between other parties—the reply is, that it is not pleaded as an estoppel, or in bar, but as a fact (among other facts) tending to show the substantial satisfaction of the plaintiff's judgement against the defendant. The mere *recovery* of that judgement would not, it is true, relieve the defendant from his liability; but the *payment* of it, would, *if done under such circumstances as to be conclusive on Snyder;* and the judgement against the latter, is stated in the plea merely as an inducement to the main and material fact of payment; and as necessary, to show in an historical order, that the money recovered and paid in that suit, was in fact the same

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money claimed to be recovered in this. Nor can the plaintiff contend that his judgement against Snyder, and the iniquitous means by which it was obtained—as admitted by the demurrer—are matters between himself and Snyder exclusively. On any just construction of Snyder's acquiescence, it accrues to the benefit of the innocent instead of the guilty; and law and justice, it is hoped, are seldom divorced.

On the whole then, the plaintiff has sold property on his original execution against defendant, and received full satisfaction of it. That satisfaction, though taken from him for a moment, by Snyder, was immediately replaced, and is now in his pocket. This is all admitted by the demurrer. Can he collect it again? In a case of gross and extreme injustice like the present, difficulties merely technical—and such may be anticipated from the ingenuity that framed the declaration against Snyder—will be obviated by Lord Audley's case. He could not be convicted without the testimony of his own wife. The Court received it, and his Lordship was convicted.

The opinion of the Court was pronounced by

PADDOCK, J.—This action was brought into this Court by an appeal from the decision of the County Court, upon a demurrer to two pleas in bar, pleaded by the defendant.

The plaintiff has set forth in his declaration, that on the 30th day of January, 1823, he recovered a judgement against the defendant, for $18,04 damages, and $2,30 costs, upon which a writ of execution issued, and was put into the hands of Henry Noble, a Deputy Sheriff, who, on the 12th day of March, 1821, levied the same on a pair of steers, supposing them to be the property of Nichols, but afterwards proved to be the property of one Jonathan Snyder; and that Snyder afterwards commenced his action against *Mack & Noble*, and recovered of them the value of them, which Mack afterwards paid; concluding with a prayer that the said Nichols may be required to show cause why an execution should not issue against him for the amount of the first judgment.

To this prayer, the defendant interposes two pleas in bar; *first*, acknowledging the recovery of the judgement,

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the levy of the execution upon the steers and subsequent recovery for them by Jonathan Snyder against Mack & Noble; yet that the said Mack afterwards sued the said Snyder, and recovered back the same sum, to wit, $98,20, which the said Snyder had before that time recovered of Mack & Noble, and had collected the same, and that he still retains the $15 for which the steers were sold. In the *second* plea in bar, the defendant details the facts more particularly which transpired between *Mack & Snyder*, and says that on the 14th day of August, 1827, Mack prayed out his writ against Snyder, returnable before Justice B., on the 24th of August, 1827, at 9 o'clock, A. M., *counting upon a promise made by Snyder in* 1823, *(and during the pending of Snyder's suit against Mack & Noble for the value of the cattle in Chittenden County Court) that in consideration Mack would agree to discontinue said suit and claim no costs, Snyder would release him from all claim for taking the steers, and that in pursuance of the agreement, the suit was discontinued; nevertheless, Snyder afterwards sued Mack & Noble again, and recovered for the steers,* which writ was served on Snyder by Hiram Sanford, who informed Snyder that the hour set for trial was 1 o'clock, P. M., instead of 9 A. M.; by means of which, Snyder was defaulted, and judgement rendered against him for $98,20 damage, and $1,63 costs, and had paid off the same, being the amount of debt and costs which Snyder before that time had collected of Mack & Noble. There being a general demurrer to these pleas, the question is presented whether they form a sufficient bar. It appears that in the second suit brought by Snyder against Mack & Noble, the steers were adjudged to be the property of Snyder, and he recovered judgement for them, which was paid off by Mack, and this judgement has never been reversed. It then remains established, that the steers were the property of Snyder, and not of Nichols.— If so, it follows that Mack in justice ought to retain the $15, as against this defendant, having had to pay it over with the addition of costs to Snyder for seising and selling the steers, which brought the sum into his possession. As to the subsequent suit which Mack brought against Snyder upon his promise to discontinue the first suit against him, in the County Court, and relinquish his claim for the

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steers, the Court do not see that this defendant had any interest in it, or that the relation of debtor and creditor, that then subsisted between this plaintiff and defendant could be altered or changed by the event of that suit, any more than it would, had the subject matter of it been foreign to that controversy. Therefore, the plaintiff has a right to sustain this *scire facias*, and nothing set forth in the pleas ought to bar him; and the judgement of the County Court is affirmed.

Ch. Adams, for plaintiff.

Briggs, for defendant.

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HENRY LEAVENWORTH, Administrator of the Estate of J. C. Thompson, vs. D. P. LAPHAM, & Co.

That, in a suit in favor of the bearer of a note, made payable to L. R. deceased or bearer, the defendant cannot plead offset against the plaintiff of matters, that stand against the estate of the deceased, by averring that this suit is prosecuted for the benefit of said estate.

That defendant cannot plead in offset demands, they have purchased against the deceased since his death.

Query, whether an action in favor of the bearer would not be barred by a plea setting forth, that the suit was prosecuted for the benefit of the estate, and that the defendant had claims which he ought to be able to file in offset.

This action has come from the County Court by a bill of exceptions, the particulars of which are sufficiently recited in the argument of Counsel, and the opinion of the Court. The action was upon a note, to which the general issue and sundry pleas in offset were plead. Plaintiff demurred to these pleas in offset.

Argument for defendant.—This is an action on a note, originally payable to Levy Rood or bearer, and brought in the name of John C. Thompson as bearer for, the purpose of collection. To this there is the plea of general issue, and four pleas in offset, declaring against Thos. D. Rood, administrator of Levi Rood, the intestate, and one note *not negotiable;* one on a note payable by said Levi Rood to Ja's. Cady or bearer, and alleging that they are the assignees of said notes for a valuable consideration; that the notes were purchased without any knowledge of such death;

and that of all these facts the plaintiff and the administrator had notice before the commencement of this suit. The fourth plea is a declaration on book against the administrator for $10,50, due from said Levi to said defendants, as a balance of their accounts.

1st. No question can arise as to the form of the pleading against the administrator of Levi Rood. Thompson was a mere trustee, and the note the property of the estate.

The defendant, therefore, properly declared against the representative of Rood. *Martin* vs. *Trowbridge*, 1 Vt. R. 477.

2d. As to the notes; in an action by indorsee of a promissory note it is competent for defendants to plead an offset or give in evidence any matter or thing, which would equitably discharge them. Rev. Stat. 144.

The pleadings admit the purchase of the notes for a valuable consideration, and in perfect good faith.

3d. Having been so purchased they can be offset although not negotiable, *Tuttle* vs. *Blake*, 8 John. R. 118; *Winch* vs. *Keely*, 1 Term R. 619; *Brundrige* vs. *Whitcomb*, Chip. R. 180; *Haven* vs. *Hobbs*, 1 Vt. Rep. 238.

These, and numerous other cases have established the principle of protecting at law equitable interest. Want of mutuality is obviated by the language of the Stat, p. 144, which is in the alternative, and admits any matter or thing to be pleaded or given in evidence, that equitably discharges the defendents.

4th. And since the notes were purchased in good faith, and without any knowledge of Levi Rood's, previous death, that fact cannot affect defendants right of offset, or to have those claims applied in discharge of plaintiff's note.

This position is supported by the plain words of the Statute, p. 144, before referred to.

The language of no part of the probate act forbids commissioners or courts to apply claims, circumstanced like these, directly on notes &c. in favor of estate, ; though it is admitted, cases could be stated, in which injury might be done to creditors, &c. A fraudulent purchase of claims after the death of intestate, might have the effect of diminishing the funds of insolvent estates, and injure creditors.

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But here all presumption of fraud is excluded; and, what is more material, the plaintiff has not alleged, that the estate was represented insolvent; nor any fact from which the Court might infer, that any injury would result from allowing the application. In *Meader* vs. *Leslie*, 2 Vt. Rep. 169, in a case similar in principle, the Court refused to disallow a just and equitable offset, on the ground that creditors might be injured, when the party himself has not *pleaded* any fact of that kind.

5. If the bringing of the plaintiffs suit in the name of Thompson be considered by the Court to have been in pursuance of the 54th sec. of probate act, p. 344, then defendants had a right to file all their claims in offset to such action. But,

6th. If this proceeding be regarded by the Court as independant of the provisions of that act, then the offset is good under the Statue, p. 144, and at common law. See 3 Vt. R. 540, *Parker* vs. *Kendall;* 3 Vt. R. 447, *Jarvis* vs. *Barker*.

Argument for plaintiff.—1st, The plaintiff contends, that had the defendants' demands, pleaded in offset, been assigned previous to the death of Levi Rood, they could not be allowed, because they are not negotiable.

2d. The demands having been assigned after the death of Rood, they cannot be allowed, because if so, it would be in the power of one creditor to swallow up the whole estate. To make the assignment good, notice of the same must have been given previous to the death of Levi Rood. 3 Vt. Rep. 540.—*Isaac Parker* vs. *Ebenezer Kendall*.

3d. If Thomas D. Rood, as udministrator of Levi Rood, has made any agreement to pay defendants the demands plead in offset, it must be enforced in some other way.—Such agreement can in no way affect the plaintiff's right to recover in this suit, as he became bearer and owner of the note, on which this suit is brought, previous to the death of Levi Rood. It does not appear, from the plea in offset, that the notes and accounts were ever allowed against said estate, or that any dividend has ever been declared in favor of the creditors. The plaintiff also contends, that the promise of Thomas D. Rood, as set forth in the plea, cannot create a claim against said estate.

HUTCHINSON, Ch. J., after stating the case, as before recited, pronounced the opinion of the Court.

The plea or pleas in offset, predicated upon the three notes, cannot be supported in this action, upon any grounds we can discover. It seems rather intended as one plea upon the three notes; for, though each is described separately, yet no promise is raised to the defendant upon either, till all three are described; and the plea alleges a promise to pay all three to the defendant. But there are more incurable difficulties. None of the notes are payable to the defendant. One of them is neither payable to order or bearer. Upon this, they never could maintain an action or plead in offset in their own names against any person whatever. But there is one difficulty pervades the whole plea as respects these notes. They are plead as against the administrator of the estate of Levi Rood, deceased, with an averment that the note described in the plaintiff's declaration ever has been, and yet is, the property of said estate; and also avers, that these notes, originally given to other persons, became the property of the defendant, by assignment, &c. since the decease of the said Levi; and that notice thereof was given to the said administrator of said Rood, and to the plaintiff, before the commencement of this action. Now this forms no claim against said estate in favor of these defendants, nor would it do so, if these notes had been negotiable, and ever so regularly assigned to the defendants after the decease of the said Levi Rood. All the claims for and against the estate of said Levi must be settled between those who were parties to those claims at the time of his decease. Two of these notes were given to one Candless, and one to Cady; and it must be taken, from this plea, that they were the owners at the said time of his decease; and, if this were so, they only could support the claims upon those notes before commissioners, or in a suit against his administrator.

There is a further difficulty still. The action was commenced in favor of J. C. Thompson, as bearer of the note. According to the decision of this Court in Addison county, cited at the hearing, as this action is brought at common law, and not by virtue of our statute, page 144, the proviso of that statute gives no right to this offset of notes

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signed by said Levi. This is spoken of by the counsel of the defendant as Judge Williams' decision, and that upon a point not material to the decision of the action. I was not present when that cause was argued and decided, but, from the report, it is evident, that the decision upon that point was conclusive of the whole case. Though the Judge, in delivering the opinion, rests his own individual opinion more upon a previous point. Though a statute lately passed, regulating such a case, the law, under which that decision was made, was in force when this action was commenced, and would govern this case also, so far as relates to the point now under consideration. And this applies equally to the last count in the plea in offset.—That being on a book account directly against said Levi, this is well plead as against him; but is no plea to the action in favor of Thompson. There is no mutuality between the parties; and without it, no offset can be maintained, except in cases coming within the provisions of said statute upon negotiable notes, which governed the case of *Martin* vs. *Trowbridge and others*. See 1st vol. Vt. Rep. p. 477.

The case cited from Chipman's Reports, upon a jail bond, where an offset was allowed, where the claims were not legally mutual, was overruled in this county last winter. The equitable jurisdiction of this Court has, several times, been exercised in compelling an offset of demands, liquidated by the judgement of courts of law and chancery, where there was no legal mutuality, but where the equitable ownership required such offset. See the case of *Connable* vs. *Buckland*, 2d Aikens' Rep. 221. This was also done in Addison county, three years since, in a case which I don't recollect to have seen reported.

But the right of the defendant to file an offset, and of the plaintiff to file back an offset of any demands he may have against the defendant, as regulated by the statute of offsets, where the jury are to find the balance in arrear from either party, can never be maintained and pursued to any practical purpose in an action at law, unless the demands are legally mutual.

A doubt might be raised, whether this action will lie at all, upon the facts now before us, if plead in a different manner. We are not called upon to give any opinion up-

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on this point. But it is obvious, that, where an estate is insolvent, and will pay but a few cents upon the dollar, the administrator must not be permitted to have his notes sued in the name of some third person, and thereby avoid the offset of mutual claims, existing between the parties at the time of the decease of the testator or intestate. Possibly a plea in bar, in such a case, might defeat the action altogether. The actions which may be brought under the 54th section of the probate act, cannot embarrass the offsets, because they are therein fully provided for.

The averment in this plea in offset, that the note belongs to the estate of said Levi, and the suit carried on for the benefit of said estate, cannot affect the declaration, as it might if contained in a plea in bar, and was left unanswered. But, if it were plead in bar, that this note thus belonged to said estate, &c. and that the defendant had a just demand against said estate, like this book account offset, which he had a right to plead in offset if the writ were brought in the name of the administrator of said Rood, possibly this might bar the action at law. Possibly, if the amount were large enough for Chancery jurisdiction, the defendants would be driven to Chancery for relief. But in some way such offsets must be had, and not be defeated by any transfer of the notes, or suits in the names of other persons, instead of the administrator. Upon the whole, the judgement of the County Court is affirmed.

Wm. P. Briggs, counsel for the defendants.

Henry Leavenworth, counsel for the plaintiff.

ROBERT BEACH vs. JAMES & NATHANIEL SUTTON.

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A deed defectively executed may be admitted as evidence to show colour of title and the extent of the party's possession, who entered under it.

A person, who has given a deed, with a special covenant of warranty of the land in question, may, notwithstanding such covenant, have no interest in the event of the suit, and be a competent witness.

If a person enters into possession of land under a pitch, the boundaries of which *are well known*, and begins in the centre to make improvements, his possession will be as extensive as the boundaries of the pitch.

Trespass *quare clausum fregit*,—Plea, Not Guilty.

On trial of this cause, the plaintiff showed no original

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proprietary title to the land described in his declaration, but depended upon possession alone;—and to make out his title to the premises in question by possession, he offered several deeds, as stated in the opinion of the Court, and offered Horace Barber as a witness to show, that he and Elisha Barber surveyed and marked out a piece of land containing 180 acres, and pitched or laid their said rights upon said land. To the admission of this witness the defendants objected upon the ground of interest, contending that the said Horace, having given a warrantee deed of the said rights of land after he had located them, was bound by his covenant to support his title to the land within those limits. But the Court overruled the objection, and admitted the witness, who testified amongst other things, that on the 30th day *of May* 1794, *he run out the west line of said pitch*, beginning at a beach tree in Hinesburgh line, and ran due north, and marked out a line;—and also that the fence of the defendants at its northern extremity stands about six rods east of said line. He also testified, that soon after his survey, in May 1794, a small clearing was made in or near the centre of the pitch; and from other testimony it was found, that that improvement had been kept up and extended to the present time, and that said pitch had been held by Barber and those claiming under him to the present day, without any attempt to contest his title thereto; but that there has never been any actual clearing or improvement made by Barber or the plaintiff, or any one claiming under Barber, as far West as the fence erected and now maintained by the defendants On cross-examination, the said Barber admitted, that he might have attended the proprietors' meeting on the 30th May 1794; and that he had certain lots voted to him in lieu of a draft.

The defendants introduced the proprietors records, by which it appeared that the town, on the 30th day of May 1794, had been laid out into lots of 30 acres each. Also, a deed from F. Allen to James Sutton of two rights of land, dated in 1819, and that by virtue of said deed he took possession of Lots No. 8, and 18, soon after the date of said deed, and gave evidence tending to show, that about 13 years ago he run a line for the East line of said lot No. 18,

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and put up a fence, which, at the North end, was about six rods West of the North end of his fence as it now stands. It was proved that said Sutton intended to hold to the East line of Lots No. 8, & 18.

It was also proved, that in 1824, the plaintiff caused a line to be run for the West line of his land, claiming thereto for the West line of said Barber's pitch; and erected a fence upon said line, which survey is as follows: "Beginning about 7 rods 1° N. from the N. E. corner of Robert Beach's hill-lot in St. George, at a stake standing in the woods; thence W. 1° S. on an old line, 156 1-2 rods to a stake and stones in the hollow N. of the said rail fence; thence S. 30° E., 214 rods to St. George line; thence E. 1° N., 156 1-2 rods, about six rods East of an old line; thence N. 30° W., 214 rods to the place of beginning, containing 180 acres."

It was also proved, that this line at its nothern extremity, was about 36 rods W. of the line said to be run by Barber in 1794; and that the plaintiff, at the time of running said line, removed the fence which the defendant had erected, and also brought his action against said Sutton, declaring for the land in said survey; but on some reference to Horace Barber, who was called by the parties for that purpose, Beach relinquished his claim to have his West line run in that manner, and John Beach executed a quit claim deed to Sutton of Lots No. 8 & 18.

It was also proved that, prior to the running of this line in 1824, the plaintiff had never designated any line or boundary upon the earth for the West line of his land; but that he did claim to be the owner of the Barber pitch; and that his West line should be bounded upon the West line of said pitch, wherever it should be found to be.

Evidence was also given tending to shew, that in 1825, the defendants were shown a stake and stones at the Northern extremity of the fence as it now stands, for the N. E. corner of lot No. 18, and that an ancient line proceeded from said stake and stones about 100 rods South; and that, finding this line, the defendants in 1825 removed their fence from its former position, and placed it upon the line where it now stands.

The counsel for the defendants contended, they had a

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right to hold to the East line of Lots No. 8 & 18; that even if the Barber pitch was run originally West of the line of 8 & 18, the same had been abandoned; that unless such a possession accompanied the land, in regard to the lines thereof, as would have subjected the plaintiff to an action of ejectment, he could gain nothing by his pitch beyond his actual improvement; and that inasmuch as the plaintiff had designated no line or boundary upon the earth for the West line of the Barber pitch, except that which was run in 1824, and subsequently abandoned, he could not hold by the Statute of Limitations, nor could he be considered as having possession to lines West of his actual improvements.

The plaintiff also gave in evidence a paper signed by sundry proprietors of St, George, agreeing to quiet certain proprietors in their pitches, which may be referred to.

The Court charged the jury that if H. Barber, claiming as early as 1794, to be a proprietor, did at that time make a pitch; did go into possession of the same; and if he, and those claiming under him, have continued in possession of the same, or any part thereof, claiming title under that pitch, undisturbed by the proprietors, and without any attempt to contest their title to the same till the present time,—the jury are warranted in presuming that the proprietors assented to the proceeding;—and he is to be considered as having acquired a legal and valid title to the land pitched. That, therefore, if the evidence was to be believed, the plaintiff had shown a good title to some land there as the Barber pitch. That in ascertaining the extent of that land, they would, in the first place, have regard to actual possession. That if the plaintiff had possessed in fact, to the line claimed by him, for the period of 15 years, at any one time, without disturbance, he had acquired a right to hold to that line.

But the defendant, on the other hand, would have a right to hold so far East as he had, at any period, held and occupied, for that period and in that manner; and that if they found that the line had thus been settled by such actual possession, they would consider themselves bound by it without reference to the original line of the pitch. But if they found that the line had not been thus settled by actu-

al occupancy, on either side, they would then ascertain the original line of the pitch. That the plaintiff was entitled, upon the principle above stated, to hold to the original boundaries of the tract; that for this purpose, it was not necessary that his survey should be recorded, if the lines were actually run; but as his survey had not been recorded, in order to enable the plaintiff to hold to any definite limits it was necessary that those limits should have been designated by some actual visible monuments, claimed originally as the boundaries of the tract; that if this was not done, the plaintiff, could hold no further than he had acqired a title by actual occupancy.

The Court further instructed the jury, that the allotment shown by the defendant, would not, under such circumstances, affect the plaintiff's right to hold to the original boundaries of the tract, (if such were designated as before mentioned) inasmuch as no attempt appeared to have been made to disturb the plaintiff, by force of that allotment, until the year 1819.

The jury returned a verdict for the plaintiff. To the several decisions and charge of the Court above stated the defendants excepted; and the case is ordered to the Supreme Court for revision.

The opinion of the Court was delivered by

BAYLIES, J.—The plaintiff, to make out colour of title, and to show the extent of his possession, gave the following deeds in evidence, viz: One from *James Savage* to *Elisha* and *Horace Barber*, dated May 29th, 1794, of six rights of land in St. George—one from *Horace Barber* to *John Beach*, containing a special covenant of warranty, and purporting to convey one half of said six rights of land, dated 10th October, 1794, and one from *John Beach* to the plaintiff, dated in 1816, of a piece of land bounded north and east by *Elihu Allen's* land, south by *Reuben Place's* land, and to extend west far enough for ninety acres. The aforesaid deeds were objected to by the defendants, and admitted by the Court.

We consider, that the deeds were admissible evidence for the purpose for which they were offered: they were not offered to make out a paper title; but merely to show colour of title, and the extent of the plaintiff's possession.

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The plaintiff offered *Horace Barber* as a witness to prove the location of his pitch of 180 acres, and the west line thereof; and his taking possession, and making a clearing near the centre of said pitch. The defendants objected to his evidence, on the ground that he had given a deed of the land in question to *John Beach*, containing the following covenant, viz: "Hereby engaging to warrant, and forever defend the above granted and bargained premises to him the said *John Beach*, his heirs and assigns, from all persons *claiming by, from, or under me, or the original grantee*," which made the said *Barber* interested in the event of this suit. But we do not perceive how this special covenant made *Horace Barber* interested: it is not pretended that the defendants, or either of them, held under him or his original grantee; so if the defendants had made out their defence, it would have been no breach of this covenant. In the admission of *H. Barber* as a witness, the County Court are supported by *Twambly* vs. *Henley*, 4 Mass. 441; and *Busby* vs. *Greenslate*, 1 Strange, 445.

Upon the evidence in the case, the County Court submitted it to the jury to find whether *Horace Barber* did, on the 30th May, 1744, run the west line of said pitch, and soon after make a small clearing nearly in the middle thereof; and from that time for more than 15 years next after, (claiming in their own right) he, and others under him, held an open, continued, and exclusive possession of said pitch; and whether said west line was plainly marked on the ground, and was known and acquiesced in by all persons interested, as, and for the west line of said pitch, during said 15 years.

If the jury found these facts, they would also find that said *Barber*, and those under him, acquired a title by possession to said pitch up to the west line thereof. These were the most important facts in the case, which were properly submitted to the jury for them to find; and they being found, the plaintiff establishes his title to said pitch, and to the west line thereof, by possession; and the defendants, by erecting their fence east of said west line. became trespassers upon the plaintiff's freehold.

Judgement of the County Court is affirmed.

Briggs & Sawyer, Attorneys for plaintiff.

C. Adams, Attorney for defendants.

JABEZ ROGERS vs. IRA STEWART, SAMUEL S. PHELPS, JOSEPH HOUGH and JOHN MORRISON; also against one STEPHENS, since deceased.

That an action on the case lies against all jointly, who are concerned in continuing a nuisance, whether they be lessees, or sub-lessees, or assignees of the lessor.

That it is no objection to the plaintiff's recovering for a nuisance, that there are other nuisances, which obstruct the same way of the plaintiff; especially when the instructions to the jury exclude all damages, except those resulting from the joint act of the defendants.

That the neglect of the plaintiff, for seven or eight years merely, to cause a house to be removed from his own land, which was wrongfully erected there, and which obstructs the plaintiff's way, is not an abandonment of the way.—Had the plaintiff, himself, erected such house, it might have been proper evidence of such abandonment.

That the plaintiff is entitled to his entire damage for the entire obstruction of his way by the defendants, notwithstanding there are other obstructions to the same way, erected by other persons; and he is not to be virtually driven to an apportionment of his damsges upon the different encroachments upon the same way.

That a recovery and collection will be a bar to any other recovery for continuing the same nuisance for the same period.

This was an action on the case for the obstruction of a private way of the plaintiff. There was a jury trial in the County Court, and a verdict for the plaintiff. Several exceptions were taken to the instructions given to the jury. These, including some points not urged before this Court, appear in a long bill of exceptions, allowed by the Judges of the County Court. The material facts in which, and the arguments of counsel, sufficiently appear in the following opinion of the Court, delivered by

HUTCHINSON, Ch. J.—It appears by the Bill of Exceptions in this case, that the plaintiff owned a piece of land, lying north-westwardly of the common, in Middlebury, and had used and occupied, for thirty or forty years, a foot-way and cart-way from this land, in a south-eastward direction, across a small piece of land, long owned by Gamaliel Painter and his heirs, and coming out into the highway, or common, near where the church now stands. The erection of a fence on the line of the highway, with gates for foot-passengers only, said fence extending across this private way of the plaintiff, was the obstruction complained of in the declaration. In this, the plaintiff complains of the obstruction of this way as a cart-way—not as a foot-way.

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The defendants' counsel urge, that this action cannot be maintained againt these defendants jointly. This point must be decided upon the following facts: Stephens, who was made defendant, but has since deceased, erected this fence as a door-yard fence to a house near by. This was in 1825 or 1826. Afterwards Stephens leased these premises, together with a factory owned by him, to the defendant, Hough, for five years; and afterwards assigned this lease to the defendants, Stewart and Phelps. And said Hough underlet the house, to accommodate which this fence was erected, to the defendant Morrison. So that, during the period of the continuance of this nuisance, now complained of, Morrison was paying rent to Hough, and Hough was paying rent to Stewart and Phelps. Upon these facts, the County Court charged the jury, that the defendants were jointly liable, if any were liable. We consider the charge upon this point correct, so far as the nuisance was continued by the ordinary occupation of the premises; and the instructions of the Court excluded any damages for any thing proved, but the ordinary occupation of the premises, and that in reference to the plaintiff's cart-way. Upon this point, the plaintiff's counsel cited 3 Stark. Ev. 991, and 10 Mass. Rep. 74, *Staple* vs. *Spring et al.*

What is already said, disposes also of the testimony about some wood, placed so as to obstruct the use of the way as a foot-way, by Morrison alone. This, not obstructing the cart-way, is not within the declaration; and not being a part of the ordinary occupation, cannot be charged upon the other defendants. Upon this, also, the instructions were correct, being in favor of the defendants.

The defendants' counsel contended in argument, that the plaintiff had abandoned this way, before the injury complained of; and this destroyed his right of recovery, if such right would otherwise exist. This argument is urged upon the following facts:

When Stephens erected said fence, he moved a house on to the premises, and extended it about nine links to the north-east over his line, and into this way of the plaintiff; leaving only ten links for a passage, which is not sufficient for a carriage-way. Since which time it could not be, and has not been used for a cart-way; though there was proof

of the plaintiff's drawing stone in the rear of the buildings, which it would have been more convenient for him to have drawn through this cart-way, had it been open.

The defendants' counsel agreed, that this cart-way, or right of way, was for the use and benefit of Rogers' property, in the rear of the Stephens' buildings, and the plaintiff suffering the obstruction to remain on his own land, must be considered an abandonment of the way. And further, that, while the house stands on the plaintiff's own land, and wholly obstructs the way, the plaintiff can suffer no damage from any other obstruction. While the plaintiff's counsel contend, in the first place, that, the whole of the different obstructions being put there at once by the same individual, neither he, nor any person claiming from him, can justify one part of them on the ground that another part would alone have produced the same effect. It is sufficient, that the part complained of, produces the effect. In the second place, the plaintiff's counsel contend, that finding both the house and fence in his way, it became his business to cause both to be removed. When he gets the fence removed, he may, if he pleases, remove the house by his own act, and open the way at once. The Court consider, that, if the plaintiff himself, had placed this house where it was placed by Stephens, extending on the plaintiff's land, so as wholly to obstruct this way, as a cart-way, the evidence of this would have been pertinent in proving an abandonment; but the plaintiff's neglecting to bring an appropriate action for the placing and continuing the house there, is no evidence of such abandonment, until a longer period has elapsed, than the one now proved; especially as the front fence, of which he now complains, was an entire obstruction of the same way. Any right the plaintiff may have, to bring trespass or ejectment for the placing and continuing the house partly upon his land; does not interfere with his right to maintain this action for the obstruction of the way.

The question of damages remains to be considered. The instructions to the jury upon this point were as follows: "The rule of damages is, what the plaintiff has lost by the interruption of the way during the period of the obstruction by the defendants, say from two to three years; not for

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trespass on the plaintiff's own land by the house, for which he had other remedies, but for the loss of the way as a team and carriage-way." The defendant's counsel contend, that the jury should have been restricted to such damages as the plaintiff had sustained for the want of the way from the road or common by the church to the Stephens house, which stood partly on the plaintiff's land. And that he was entitled to no damage for that, because it was of no use for him to get there with his team, while he could go no further.

We consider that the plaintiff must be entitled to his reasonable damages for the loss of his way; and the defendant's objections to the full recovery in this action seem to suppose, that the plaintiff has his ample remedy, in an action for the placing and continuing the house on his land, for the injury he sustained by the loss of way. This is at best but doubtful. Whether it be so or not, the plaintiff may as well recover his whole damage in this suit, as if the other obstructions were named in the declaration: especially as this recovery will be a bar to any other action for obstructing the same way during the same period.

The judgement of the County Court is affirmed.

Phelps, *Bell* and *Starr*, for the defendants.

Bates & Chipman, for the plaintiff.

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JOHN B. LOVELL VS. WM. H. FIELD and IDA FIELD.

That defendants, being administrators, cannot object to the report of auditors, on account of the interest arising from their being creditors to the estate; the allowance of the claim being against this interest.

That administrators are liable, as individuals, for the debts they contract, while administrators, though the contract be for the benefit of the estate.

That the exceptions to the decisions of the County Court bring up to the Supreme Court no questions of fact, but only the questions of law arising upon facts found or agreed to.

This was an action on book account, which was submitted to auditors by the County Court, who made a special report of facts, and returned a balance in favor of the plaintiff. By this report, it appears, that there was no objection to the items of the plaintiff; but objections were

made to the plaintiff's recovering at all, for reasons presented in the exceptions to the report, and again in exceptions to the decision of the County Court. The facts of the case need not be recited here, they are so fully stated in the arguments of the counsel, and the opinion of the Court. One fact, of a special contract about pay-day, is incorrectly assumed by counsel, but corrected in the opinion of the Court. The County Court accepted the report, and rendered judgement for the plaintiff on the same.

Argument for the defendants.—Three questions are taken by the defendants in this case:

First, Whether an administrator, making a debt for the benefit of his intestate's estate, with notice to the creditor of the purpose for which it was contracted, binds himself in his individual capacity.

Second, Whether creditors of an intestate's estate, having had their claims allowed by Commissioners, but not having received payment, are competent triers of any question as to such estate, which, in its effect, is to lessen or increase their dividend.

Third, Whether, when a creditor agrees with an administrator to wait for his pay until an estate is settled, (and the estate is *not* settled,) his debt is due until that fact takes place.

Upon the *first* point, it is evident that the credit is given to the intestate's estate, *as such*, and not to the administrator, *in his personal capacity*.

As to the *second* point, the creditors are directly in interest in the result of the question. What they allow or disallow operates directly, where the estate is insolvent, (as in the present case,) to increase or reduce their dividend.

And, upon the *third* question, as the contingency is made by agreement of the parties themselves, and is, in itself, a condition precedent, it must occur before the right to sue can accrue at all. If an administrator does not seasonably settle his administration account, the party suffering from the delay can call upon the Probate Court, and obtain the liberty of commencing an action upon the Probate Bond.

Argument for the plaintiff.—The plaintiff in this case contends, that, although the goods may have been delivered to

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the administrator for the benefit of the estate, yet the estate cannot be made chargeable, but the administrators must be made liable in their private capacities. 2d, The interest of the auditors could not be affected, whether the estate should prove solvent or insolvent, (which has not yet been settled.) If solvent, they would reckon the whole amount of their claim, and, if insolvent, the interest must operate in favor of the defendants; as it would be an object with them to reduce the plaintiff's claim, to as small an amount as possible; and by so doing, increase their dividends. 3d, It will be seen by the auditor's report, that the plaintiff's account was admitted by the defendants; but the defendants contended, there was a special contract, in relation to the manner and time of payment. One of the defendants, Wm. H. Field, testified directly opposite on this point; yet the auditors, on weighing the testimony and circumstances, were induced to believe, there could have been no such contract made, or sworn to by defendant. Had the testimony of Field been taken as a bar to this suit, it would be impossible for the plaintiff ever to recover the amount of his claim. He swore, as will be seen by the report, that the goods in question were not to be paid for until the estate of James P. Field was settled. It was admitted the estate had not yet been settled, although the time given by the Probate Court had elapsed long before the commencement of this suit. The defendants being administrators of said estate, might prevent the plaintiff from recovering his demand for years, by delaying to close the estate. We also contend that Field was not a competent witness to prove a special contract, and do away the book, as the account was *prima facie* due, and must be done away by testimony other than the parties.

HUTCHINSON, Ch. J.—The supposed interest of the auditors in this case bears the wrong way to support the objection. The auditors were creditors of the estate, and they have allowed the whole of the plaintiff's account against the defendants. If this created any interest, it would be an interest to disallow the claim in whole or in part, thereby to leave a larger fund for the payment of their own debts. The defendants might be benefited, but never

could be injured by this interest. The objection, coming from them, cannot prevail. Had the plaintiff's claim been disallowed in whole, or in part, and he had taken the exception, it would have deserved a different consideration. But nothing appears in the report, but that there is an ample fund to pay all the debts in any event; though the counsel suggest an insolvency of the estate. This, to have any effect, should appear as a fact found.

The defendants further object, that they purchased these articles of the plaintiff's account as administrators, and for the benefit of the estate; and, therefore, are not liable as individuals, but only as administrators; and let execution come only against the estate of the deceased. No authorities are produced to show, that any other action than this would lie at all. Probably none can be found. The administrators may make contracts in their favor by sales of the property, or renting the real estate; and upon these they may maintain actions in their own names, without adding administrators; or they may declare as administrators, and recover in either of these ways: and the addition in the last case shows their accountability to the estate for the avails of the suit. But the administrators cannot promise to bind the estate in the way now contended for. The promise is their own, and they are personally liable. They may make it on the credit of the estate in their hands; but whether they have a right to pay out of the same, depends upon its being so beneficial to the estate as to receive the sanction of the Probate Court.

The third, and last objection, rests on the point of an agreement of plaintiff to wait for his pay, till the estate should be settled. There is no doubt that an agreement for a future pay-day may be so made, that no action can be maintained for the demand, till such pay-day has arrived. But the plaintiff contends, that this agreement is void by its describing a pay-day that never can arrive; for, if this claim was to be paid out of the estate, the payment of it must precede a final settlement; and further, that the defendants might never settle, and thus keep off the time of payment. Probably a rational construction of such an agreement would avoid these difficulties. The construction should be, when the estate is so far settled as to render it

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proper that the administrators should be paying the debts, or have obtained an order of the Probate Court for such payment. If the administrators neglect their duty and seek occasion for delay of payment, the construction should be, that there be a reasonable time for the estate to be so settled, as that the debts can be paid with safety and propriety.

But a further answer to this objection is very conclusive. The auditors have not reported any such agreement to wait for the pay. They report that one of the defendants testified to such an agreement, but they also report, that the plaintiff as absolutely testified, that there was no such agreement. This was a matter of proof before the auditors, and their report shows, that they did not find the fact proved. It would have been more correct for them to have said nothing about the testimony, or who testified about the fact, unless to present an objection to testimony, which does not appear in this case; but merely have stated that the defendants contended for such an agreement, but the same was not proved.

It is now urged, that the defendants were not competent witnesses to prove such an agreement. There appears to have been no objection of this kind raised before the auditors, and it is too late to raise it in objection to their report. But, if the objection had been raised in season, it must have been overruled, according to the doctrine of the case of *Truesdell* vs. *Stevens*, in Aikens' Rep. The defendant was admissible to show the debt not due when the action was commenced. But the plaintiff's testimony exactly contradicting that of the defendant who testified, the whole was neutralized.

The judgement of the County Court is affirmed.

Philip C. Tucker, for the defendants.

Woodbridge & Son, for the plaintiff.

JABEZ ROGERS *vs.* E. W. JUDD et al.

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A. acquires no property in wood and timber by their floating in the water over his land. But A. has an *exclusive* right to seize wood, and timber, floating and moving in an Eddy, over his land; and to convert such wood, and timber to his own use; unless the owner in a reasonable time claims the same.

If B. who is not the owner, seize wood and timber, floating in an eddy, over the land of A., this is more than a trespass upon the freehold; it is a violation of A's *exclusive* right to seize the wood and timber himself; and in an action of trespass for this injury, the plaintiff should recover the *value* of his chance to seize, and enjoy the wood and timber, which *chance* he had lost by the seizure made by B.

This was an action of trespass *quare clausum fregit*.

Plea 1st. General Issue, 2dly, As to the digging and quarrying, a licence. Action tried December Term, 1832.

On the trial of the issue the plaintiff gave in evidence a deed from Gamaliel Painter to himself, dated September 19, 1791, of about 8 acres, including a part of the Eddy so called in Otter Creek, immediately below the falls in Middlebury, and also the land where a certain Still House and Potash, afterwards erected by the plaintiff stood. He also gave evidence tending to show, that for many years after the execution of said deed, the plaintiff was in the yearly practice of taking from the Eddy large quantities of floodwood which floated down the Creek and remained floating in the Eddy, which was used by the plaintiff in his said Still House and Potash, as well as for fire-wood at his Dwelling House, and other purposes; and also saw-logs which had floated from the owners, many of which were never reclaimed. He also proved that the defendants Judd & Harris, had on various occasions during the period stated in the declaration, taken out of the said Eddy considerable quantities of wood and logs which were found floating there and appropriated them to their own use.

The defendants thereupon gave in evidence a mortgage deed executed by the plaintiff to Tooker and Mead dated in August 1811, of "*the land on which said Still House and Potash stood, and three rods round in every direction, together with the privileges and appertenances thereto belonging*. And also a record of a foreclosure of said Mortgage by action of ejectment, and a writ of possession executed in February 1815. The defendants also showed

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a chain of deeds bringing down the title of Tooker & Mead under said Mortgage and foreclosure to themselves. They also gave evidence tending to show that from February, 1815, to the present time, those who had occupied said Still House and Potash under said deed had exercised the right of taking floodwood &c. from said Eddy as they had occasion. It also appeared that the plaintiff had exercised the same right upon his adjoining land. It appeared that the Distillery had not been carried on for many years past, but that the Potash was still continued.

It appeared the waters of the Creek covered a part of said land conveyed to the defendants at the north-easterly part of said Eddy, but whether the waters flowed within the three rods at any other place, and if so, how far, was a subject of controversy. The plaintiff claimed that by his deed from Painter he owned a part of the land under the waters of the Eddy which was not within the three rods from the Potash.

The defendants also introduced evidence tending to show that the floodwood &c. taken by them was taken on their land, or at least where the waters of the Creek came in contact with their land; and the plaintiff introduced evidence tending to show, that a considerable portion thereof was taken on his the plaintiff's land. The counsel for the defendants contended, and requested the Court so to charge the jury, that the plaintiff had no property in the floodwood and timber floating in the Creek and could not recover for taking, and that he could recover damages only for the injury done to him in going upon his land. The Court refused so to charge the jury, but did charge,

That neither party is the owner of wood, timber &c. floating in the Eddy over his land, but *has a chance there to take up such property, and finally to enjoy it.* And each party has a right to take it over his own land if he chooses to exercise that right. That they would first enquire as to the defendants boundaries, whether the three rods came in contact with the water, and how this was from November, 30, 1824, to November 30, 1830. That if they found both parties owning land extending into the water at the several times of taking wood &c. which appears to have been in times of high water, then the Court consider that each

party had the better right as against the other of taking up what came to or upon his land if he chose so to do, and in this view, the defendants would not be liable except for what they took, if any, by going beyond their three rods.

That if they found that the three rods did not reach the water at the several times of taking between Nov. 30, 1824, and Nov. 30, 1830, then the defendants would have no right to take up at all *if the plaintiff signified his choice to do it and would actaally have done it.*

But if the defendants did go beyond the three rods to draw in the timber &c. and no adverse right of doing so was acquired by 15 years use, plaintiff was entitled to recover in respect of what was taken by going beyond the three rods.

On the subject of damages the Court charged as follows, and no further, viz: "If you find the plaintiff entitled in this part of the case, yet his damages are to be estimated by keeping in mind the right of the owners above, of pursuing and claiming their wood, timber, &c. It was the chance of enjoying what shall not be pursued and claimed" which they were to consider. Evidence was given as to the quantities of marble, stone, &c. dug and taken by defendants on the plaintiff's land—and evidence to prove and disprove the plaintiff's licence therefor—but no question reserved on that part of the case.

Verdict and judgement for the plaintiff. And to the refusal of the Court to charge as requested, and to so much of the charge as above stated—the defendants excepted. Exceptions were allowed, and the case now comes here for revision.

Phelps & Bell for defendants.—1st. The defendants contend that as plaintiff had no title to or interest in the flood-wood in question, he ought not to have recovered for taking the wood.

2d. If the plaintiff had a sort of contingent interest in the wood, yet if the defendants owned lands on the Eddy, they had an equal interest, with the same right to take the wood; and the mere fact of taking it across the plaintiff's land would not entitle him to recover for it.

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H. Seymour for plaintiff.—The Court were correct in refusing to charge the jury that the plaintiff could not recover for the floodwood, &c. on the ground that he had no property in the same.

The action is trespass, and the possession of the plaintiff was sufficient for him to maintain his action against the defendants, who were mere trespassers without pretence of title.

The property taken by the defendants from the eddy floating over the land of the plaintiff, was the property of the plaintiff, subject to the claim of the owners, should it be identified, and claimed by them; and the plaintiff must be regarded as the first possessor. 2 Black. 402, 2d. Sec.

The deed of the Distillery and Potash, with the three rods around must be construed as confining the grantees, and those claiming under them to three rods; and the Court charged correctly, that if these three rods extent did not reach the water, the defendants had no right to take wood, &c. from the water, if plaintiff manifested a disposition to take it therefrom, unless defendants had acquired a right to take it by 15 years using.

The opinion of the Court was delivered by

BAYLIES, J.—Neither party in this suit was the owner of the wood and timber in question, while floating, and moving from place to place in the eddy. But each party had the exclusive right to seize all such wood and timber, while floating and moving over his own land, and to take it out of the water for his own use; and if the owner did not claim such wood and timber in a reasonable time, the the same would become the property of the captor by occupancy.—(2 Black. Com. 402.) If the defendants, to secure the wood and timber, which they had lawfully seized floating over their own land, drew the same across the land of the plaintiff, this would not subject the defendants to pay the plaintiff for such wood and timber; but they might be liable for *trespass* upon the plaintiff's freehold. In such case the damages would probably be small. But if the defendants seized the wood and timber, while floating over the plaintiff's land, and drew it out of the water to convert to their own use, this was more than a *trespass* upon the free-

hold. It was a violation of the plaintiff's *exclusive right* to seize the wood & timber in that situation. In assessing the damages for this violation, it is for the jury to find, what the pl'ff *lost* by the defendants' infringing his exclusive right. The pl'ff did not lose the wood and timber, for these were never his; but he lost the *chance* of seizing the wood and timber on his own land, & converting them to his own use, if the true owner did not prevent it. The jury should enquire what this *chance* was *worth* to the plaintiff, for so much he *lost*, by the defendants' *trespass*.

If the plaintiff's *chance* to seize the wood and timber was *positively* certain, the *value* of this *chance* was much less than the *value* of the wood and timber on the land—the plaintiff having absolute property in the same: the difference was the expense of seizing and drawing the wood and timber out of the water upon the land, and the risk of losing the same by the owner. But the plaintiff's *chance* to seize was not *positively* certain; but depended upon contingencies, which rendered his *chance* uncertain, and lessened its value. If the defendants had not seized the wood and timber, when they did, the water might have carried them out of the eddy, and the plaintiff would have *lost* his chance to seize. This contingency of water carrying wood and timber out of the eddy had happened, and might again, which rendered the plaintiff's chance to seize in some degree uncertain, and of less value.

In high water, as often as once in every ten or fifteen minutes, wood and timber in the eddy form a complete circle, which is partly over the defendants' land, and partly over the plaintiff's land. Now if the defendants on their land, had as good a chance to seize the wood and timber in question, when floating in this circle, as the plaintiff had on his land, then the plaintiff's *chance* to seize, was lessened one half, and was worth only one half as much as it would have been, if the defendants had no *chance* to seize on their own land.

It was for the jury to have found the *value* of the plaintiff's *chance* to seize and enjoy the wood and timber, that were taken by the defendants on his land, and as they found the *value* of his *chance*, all circumstances considered, so should have been their verdict for damages, on account of the defendants' depriving the plaintiff of his *chance*.

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Upon the above principles the cause should have been submitted to the jury; but the Court so charged, that the jury might understand that they were to assess damages for the plaintiff according to the value of the wood and timber seized by the defendants, on the plaintiff's land, and not pursued and claimed by the owners. If this was the meaning of the charge, it was not according to the principles which we consider to be correct: therefore, the judgement of the County Court is reversed, and a new trial granted.

ALMIRA HALL VS. ABEL TOMLINSON.

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Where a Sheriff makes an irregular levy of an execution on real estate in consequence of which no title passes to the creditor, *held* that on his failure to make a proper levy, an action may be immediately commenced against him—that the cause of action is then complete, and that the statute of limitation on the action would commence running from that time. Therefore, when a creditor went into possession under a void levy and was evicted by the judgement debtor more than six years after the same, the statute of limitation commenced running on the action against the Sheriff from the time of the levy and not from the time of the eviction.

This was Trespass on the case against an officer, for insufficient and illegal service and return of an execution. Plea not guilty within six years before the commencent of the action, on which issue was joined to the jury in the County Court.

To support the issue on her part the plaintiff gave in evidence the record of the judg't in her favor against Elias Hall, and the levy of an execution issued thereon on lands, made by the deputy of the defendant; also, the record of a suit in ejectment in favor of said Elias Hall against the plaintiff, for said lands. It was admitted that soon after the six months had expired the plaintiff took possession under the levy, without suit or opposition, and continued in undisturbed possession until said Elias commenced his suit aforesaid and it was further admitted that said Elias recorded in said ejectment on the ground that the levy was defective and void.

It was contended by the plaintiff, and the Court were requested to charge the jury, that if the plaintiff had no reason to expect that the levy would be contested until six

years, of the commencement of this action, she was not barred; and also that she had an accruing cause of action from the time of the levy until the final recovery of the land by said Elias.

But the Court instructed the jury that the plaintiff was barred, and there was accordingly a verdict and judgement for the defendant.

To the charge aforesaid, plaintiff excepted, upon which the case comes here for revision.

Counsel for the plaintiff.—Plaintiff contends that the plea of the statute of limitation does not apply to this case. The cause of action was not complete till the judgement of the Supreme Court, vacating the levy.

The execution was satisfied on the face of it. Plaintiff was put in possession of the property, which constituted the satisfaction of the debt, and continued in possession till dispossessd by the judgement of the Supreme Court.

The damages recovered in the ejectment suit, were accruing up to the time of commencing that suit.

The act done was founded on a record, to which the Statute was not pleadable.

Statute does not begin to run till the cause of action is complete. D. Chip. R. 353, *Baxter* vs. *Tucker*; 4. Esp. R. 18, *Compton* vs. *Chandess*; Bal. on Lim. 92, 96, 100.

Counsel for defendant.—The only question in this case is whether the statute of limitations runs while the controversy was pending relative to the title of the land set off.

The levy was void on the face of it, having been made after the execution expired. The cause of action therefore arose immediately upon the execution expiring and the statute of limitation began to run at the time.

The pretence that the plaintiff was not aware of the defect in her title until the decision of the ejectment is unavailable. That point has been too often decided to require decision. Vide *Balley* vs. *Faulkner*, 3 Bar. & A. 288; *Short* vs. *McCarty*, Do. 626; *Brown* vs. *Howard*, 2 Bro. & Bing, 73; *Whitehead* vs. *Howard*, Do. 373; *Bree* vs. *Holback*, Douglas, 630; *Read* vs. *Markle*, 3 Johns. 523.

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Hall vs. Tomlinson.

The opinion of the Court was delivered by

WILLIAMS, J.—It is not set forth in the case what was the irregularity in the service and return made by the defendant on the execution therein mentioned, which occasioned this suit. It is agreed however, that the return was dated the day after the execution expired, that on the trial of an action of ejectment brought by Elias Hall the debtor in the execution, against the present plaintiff, the levy was adjudged to be void, and in consequence thereof a recovery was had against her in that action.

To determine when the statute of limitation commenced running on the plaintiff's cause of action, it is only necessary to determine when she could have commenced this suit. The counsel for the plaintiff consider that her cause of action did not accrue, or was not complete until the recovery had against her, in the action of ejectment. This however is incorrect; the defendant neglected his duty when he failed to make a sufficient levy and return on the execution, at that time the cause of action was complete against him. The insufficiency of the levy to pass any title to the plaintiff, and the illegality of the defendant's proceedings, were then as apparent as they now are. She was under no necessity of waiting until the validity of the levy was tried in the action of ejectment, but might commence her suit immediately against the defendant and in that suit have a determination, whether any title passed to her by the levy which the defendant attempted to make. If she preferred to remain in possession and take the chance that the defect might not be discovered until her title was perfected by length of time, she must abide the consequences if the defendant is protected by the statute of limitations. Inasmuch as the neglect of duty in the defendant for which this action is brought occurred more than six years before the commencement of this suit, (the levy having been made or attempted April 1823,) the statute of limitations is a bar to the plaintff's action, and the instructions of the Court to the jury were correct. The case of *Young* vs. *Dickinson*, decided in this County in April, 1823; the case of *Read* vs. *Markle*, 3 John. 523; *Whitehead* vs. *Howard*, 2 Bro. & Bing, 373; *Balley et al* vs. *Faulkner et al*, 3 Barn. & Ald. 288; *Short* vs. *M'Carthy*, Do. 626.

Rice et al vs. *Hosmer*, 12 Mass. 127: *Miller* vs. *Adams*, 16 Do. 456; fully established the law as laid down in this case by the County Court.

The judgement of the County Court must therefore be affirmed.

Doolittle, for plaintiff.

Phelps & Bell, for defendant.

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JUDD & HARRIS vs. SETH LANGDON, JR.

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That a sale of personal property, otherwise *bona fide*, must be completed by such a visible and substantial change of possession, as gives notice of the new owner, or it will be liable to the attachments of the creditors of the vendor.

That the purchaser of colts, buys also the farm on which they are kept, by a man employed by the vendor, yet neither takes possession of the farm, nor causes his deed to be recorded, makes no sufficient change of possession as against creditors, or purchasers.

That, when a purchaser would hold property against an attaching creditor, who has obtained judgement and execution, and such purchaser sues before the writ of such creditor is returnable, he cannot take advantage of any defect in the officer's return.

This action came up from the County Court, on exceptions to the decision of said Court, upon a case agreed to by the parties. The case omits a statement of the defects in the officer's return, by which he justified. This omission is, however, supplied in the argument of the counsel for the plaintiff. The following is the case agreed upon:

This action is *trespass*, with force and arms, for taking and driving away from and out of the possession of the plaintiffs, two yearling colts, the property of the plaintiffs, on the 24th January, 1831. The defendant justified (as constable) the taking of the colts, as the property of John Wilson, on a writ of attachment at the suit of Adin Hall against said Wilson. It is agreed that the plaintiffs purchased said colts of John Wilson, about the 1st of January, 1831, for the price of $60, and paid therefor in four sets of grave-stones, for said Wilson's family, who were carried away and drowned by the flood the July preceding; that the grave-stones came to $8 more than the price of the colts, as agreed on, which the plaintiffs gave to Wilson, as a *bonus*, on account of his losses by the flood.—That these

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colts were, at the time of the sale, and for some time previous had been, kept on a farm, which had, until the execution of the deed hereinafter mentioned, belonged to said Wilson, lying about one mile from Wilson's usual residence, and were there when attached.—That, on the 28th day of December, 1830, and but a few days before the sale of the colts from Wilson to the plaintiffs, Wilson executed a deed of said farm to the plaintiffs, in due form of law, and which was duly recorded in the February following.—That soon after the sale of the colts, as aforesaid, by Wilson to the plaintiffs, Wilson left the country, and has not since returned.—That, for some time previous to said sale, said Wilson had employed one Fitch to fodder the colts at the barn on the farm; and, about the time that Wilson went away, he told said Fitch, that he had sold said colts to the plaintiffs, and that he talked of keeping them for the plaintiffs, at the barn on the said farm; and, if so, the plaintiffs would pay him, Fitch, for foddering the colts; and that said Fitch did continue to fodder said colts at said barn, from the time said Wilson went away, until they were attached and taken away by the defendant, as before stated: and that the plaintiffs did, after the taking by the defendant, pay said Fitch for foddering said colts, after Wilson went away.—That the attachment was made on or about the 24th January, 1831, and two or three weeks after Wilson had left the country.—That the colts were sold by defendant, as constable, on the execution obtained in said suit, *Hall* vs. *Wilson*.

On the foregoing case stated, the County Court decided that the plaintiffs ought not to recover, and rendered judgement for the defendant to recover his cost. To which decision the plaintiffs excepted, and the case was ordered here for revision.

Argument for the plaintiffs.—The defendant cannot justify under his process. The service was defective and void. The time, place, and manner of leaving the copy, were not stated in the return; nor any certificate, that the return was endorsed on said copy: Aiken's R. 106–7, *Marvin* vs. *Wilkins*.

The case finds, that the sale of the colts, from Wilson to

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plaintiffs, was *bona fide*, and for valuable consideration; and that the possession accompanied the sale. The farm, whereon the colts were kept, being conveyed to the plaintiffs, they came into possession of it. The legal title being in them, attached to it the legal possession also. The deed being unrecorded, at the time, makes no difference, as between the plaintiffs and Wilson. The possession was as legal and complete without recording as with. And the colts remaining on the farm, after the conveyance of the farm and sale of the colts, the possession of both was strictly and legally in the plaintiffs. After the sale of the colts, Fitch was, to every intent, the agent of the plaintiffs. Nor can he, in any wise, be considered as the agent of Wilson. His agency for Wilson ceased, on the sale of the colts from Wilson to plaintiffs; and about the same time Wilson left the country. Fitch was informed of the sale to the plaintiffs, and was requested to take care of the colts for plaintiffs; which he did; and called on plaintiffs for his pay, and was paid by them. With full knowledge of the sale of the colts to plaintiffs, and the absconding of Wilson, how can it, with propriety be said, that he acted as the agent of Wilson? He knew that Wilson had no interest in the colts, or the farm; and that he had absconded, not expecting to return. What interest had Wilson in the property, about which Fitch could exescise any act of agency? The facts were well known to him, and his own act in calling on the plaintiffs for pay, shows whose agent he considered himself.

This case falls distinctly within the principles of the cases, 2 Vt. R. 374, *Barney* vs. *Brown*, and 2 Vt. R. 555, *Spaulding* vs. *Austin*.

Argument for the defendant.—1st, The objection to the officer's return is not available in this case. The suit is trespass for taking the property, and was brought before the return day of the attachment served by the defendant. The writ, therefore, is a sufficient authority.—See *Braynard et al.* vs. *Burton et al.* 5 Vt. R. 97. Besides, a return, deficient as this is, is still sufficient to hold the property as against a third person.—See *Newton* vs. *Adams & Shepherd*, Franklin Co. Sup. Court, 1832.

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2d, In this case it is not necessary for the defendant to plead a justification. The only purpose of showing the process was, to entitle the defendant to impeach the conveyance from J. Wilson to the plaintiffs. The case is precisely the same as that of *Braynard et al.* vs. *Burton et al.* cited above.

3d, The Court decided correctly, in pronouncing the conveyance from Wilson to plaintiffs fraudulent for want of a change of possession.

There is no ground for calling Fitch the agent of the plaintiffs. He had no communication with them—no authority from them, nor any accountability to them, previous to the attachment of the property. He was strictly the agent of Wilson; and his possession was Wilson's possession. The deed from Wilson to the plaintiffs, of the farm, does not vary the case, as they had no possession in fact, of the farm, nor was that deed recorded, until after the attachment.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—The defendant's counsel have fully answered the plaintiffs' objection to the defect in the defendant's return upon the writ, *Hall* vs. *Wilson*. That writ not being returnable till after the present suit was commenced, the defendant can justify by the writ, without showing any return of the same. Moreover, that return has, pending this suit, answered Hall's purpose, to obtain judgement against Wilson; and, till that judgement is reversed, must be binding against third persons, unless they can attack it with proof of fraud. Of that none is suggested in the present case,

The only remaining question is, whether the purchase by the plaintiffs of Wilson had become so complete, that they can hold the colts against the creditors of Wilson.—The case shows, that they were on the farm where Wilson had kept them, and in the care of one Fitch, who had foddered them for Wilson. The plaintiffs had a deed of the farm from Wilson, but that was not recorded till after this attachment. Wilson, about the time of his leaving the state, told Fitch he had sold the colts to the plaintiffs, but it does not appear that Fitch ever undertook to fodder

them for the plaintiffs. The plaintiffs' paying him, after this attachment was made, could make no difference. It could not have relation back to defeat this attachment.—Nothing appears, that the plaintiffs exercised any acts of ownership over the farm, or the colts, or did any thing tending to give notice to any creditor or purchaser, that they had any claim upon the farm or the colts, till after they were attached by the defendant. This circumstance renders this case wholly unlike those, cited and relied upon, by the plaintiffs' counsel. In both those cases, the purchaser gave notice of the purchase to the person having the care of the property, who expressly became the keeper for the new owner. The plaintiffs paid Wilson the full value of the colts, and even more than that. The contract of sale was sufficiently complete as between the plaintiffs and Wilson, but not so as it regards the attaching cfeditors of Wilson, or *bona fide* purchasers from him.

We had supposed, the several reported cases had settled the question, that there must be a visible, substantial change of possession of personal property, or the purchaser cannot hold against attaching creditors of the vendor. It should be treated as settled. The possession and use of personal property is such strong evidence of ownership, that all persons may well suppose, that he who has once owned such property, and still has it in possession, is the actual owner; and they may treat him as worthy to be trusted on account of it. And it operates as a fraud upon them, if this natural trust and confidence is defeated by some sale, of which they know nothing, and have no means of knowing, and have no reason for inquiring to know.—On the contrary, if the purchase is real, it is easy to make it appear so, by an entire change of possession. There is no end to the controversies that will arise from admitting any other criterion of the time when a sale is complete, but the change of possession. Suppose the same property should be attached by virtue of two writs—one against the vendor, and one against tho vendee, it will be easy to determine whether the possession is changed; but not easy to decide, upon any other principle, to which the property belongs.

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The decision of the County Court, which was in favor of the defendant, is affirmed.

Judd & Harris vs. Langden.

Doolittle, for the plaintiffs.
Phelps, for the defendant.

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JABEZ ROGERS, VS. EBEN W. JUDD.

That the circumstances, admissible in evidence to rebut the presumption of payment, should be such as are in the way of recovering a judgement, and not merely such as render a collection of the debt improbable, like the poverty of the debtor.

That twenty years neglect of collection, is a sufficient period to ground the presumption of payment of a bond.

This was an action upon a bond, tried at the County Court, and brought to this Court for a hearing upon the following bill of exceptions, agreed to by the Counsel for the parties.

This was an action on bond, dated October 2d, 1805, in the penal sum of $200, conditioned for cutting a canal through the plaintiff's land, by the first day of August, 1806; which bond was signed and sealed by the said Eben W. & Stephen Judd, since deceased. To the declaration on this bond, the defendant pleaded, 1st, the General Issue, *Non est factum*, and 2d, a Release.

The action was commenced to Addison County Court, at their Term 1829, and, inasmuch as 20 years elapsed after the accruing, and before the commencement of said action, and that the release set forth in the 2d plea of defendant, had been lost, and could not be produced in Court, the defendant contended that the presumption of the release of payment of said bond, was legally inferable, from the lapse of time as aforesaid. The Court decided that the presumption of release of payment of said bond was legally inferable, from the lapse of time; unless evidence to rebut said presumption should be furnished on the part of the plaintiff. The plaintiff then offered evidence, tending to rebut the presumption, from the situation of the defendant; that, from the time the

cause of action accrued in Aug. 1806, until the year 1820, the defendant was confined a prisoner in jail on a large execution, and that he had no visible property, and, whatever property he had, was chiefly stock in the Middlebury Marble Manufacturing Company; and also evidence, tending to prove, that the plaintiff, by reason of great losses by fire, soon after the cause of action on the bond accrued, became poor, and much embarrassed in his pecuniary circumstances. And the plaintiff further offered evidence tending to prove, that, in the month of June 1813, the plaintiff was committed to jail on an execution at the suit of his creditors, who lived in New York, for a sum of more than $2000; with evidence accompanying, tending to prove, that the plaintiff continued a prisoner in jail on said execution, from the time of his commitment in june 1813, until the year 1820. The plaintiff, further to rebut the presumption, offered in evidence a writ and declaration, counting on said bond, which writ was dated the 30th of July 1826, and made returnable to Addison County Court, at their Term in 1826—which writ was duly signed by a Justice of Peace; accompanied with the testimony of C. C. Waller, Esq. the attorney who drew the writ, that the writ was made at the time it purported to be made, and that said bond had been left with him by the plaintiff for the purpose of commencing a suit on it a considerable time before said writ was made, and that the plaintiff had consulted him as to his right of sustaining an action on the bond, and that he advised him, that the lapse of time would be no objection to his sustaining the action at that time, but would be a presumptive bar, after 20 years from the accruing of the action; and that the reason, why said writ was not served, was, that the plaintiff, by reason of his poverty, was unable to procure bail for the prosecution of the suit. Whereupon the plaintiff's counsel requested the Court to charge the jury, that the *whole period* of the plaintiff's imprisonment in jail, on said execution, ought to be deducted from the 20 years. But the Court refused so to charge; but charged the jury, that no part of the period, of the plaintiff's remaining a prisoner in jail ought to be deducted from the period of 20 years.

The plaintiff's counsel further requested the Court to

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charge the jury, that the plaintiff having consulted counsel, and procured a writ to be made, counting on said bond, within 20 years from the accruing of the action, was evidence relevant to the issue to rebut said presumption, with the accompanying evidence of said Waller; but the Court refused so to charge the jury; but did charge the jury that the procuring said writ to be made, with the accompanying evidence of said Waller, was irrelevant to the issue, and ought not to be admitted in evidence; on which the jury returned a verdict for the defendant.

To which said decision of the Court, and their charge to the jury as aforesaid, the plaintiff excepted.

Argument for the plaintiff.—This case presents two points on which the County Court decided, and charged the jury, incorrectly, viz.

1st. That the period of plaintiff's imprisonment ought not to be deducted from the 20 years, which is the shortest period, from which payment is legally inferable from the lapse of time, in the case of a bond.

2d. That the consulting counsel, and taking out a writ on the bond within 20 years, with the accompanying testimony of C. C. Waller, Esq. was irrelevant to the issue, and ought not to be admitted.

It is contended by the plaintiff's counsel, that the Court was incorrect on both points. The statute of limitations creates a positive bar; the lapse of time, a presumptive one, and both have their saving provisions arising from disability to sue. In the enumeration of disabilities to sue, which entitle the party to the saving provision in our statute of limitations, *imprisonment*, is one. Several others are mentioned, and all are equally legal disabilities.

The Legislature have fixed the time, for bringing the suit, after the disability is removed, in regard to positive bar; and the common law has settled the rule, in regard to the presumptive one by lapse of time. In the case of a bond, the common law rule is, that 20 years from the accruing of the action, in the absence of any evidence to rebut, furnishes sufficient ground of presumption of payment. But this presumption may be rebutted in various ways. A disability to sue furnishes strong evidence to re-

but the presumption; and the whole time of the continuance of the disability, is, by the common law, to be deducted from the whole period which furnishes the presumptive bar. Twenty years, elapsed after the accruing of the action, is presumptive evidence of payment; but, if a disability to sue arise within that period, the whole time of the continuance of that disabilty is to be deducted from the 20 years. Swifts Dig. 303; 16 John. R. 210, *Baily* vs. *Jackson*; 10 John. R. 111, *Jackson* vs. *the People*; 2 Cranch, 180, *Dunlap* vs. *Ball*; 3 Day, 289, *Cottle* vs. *Payne*.

In the statute bar, when once it begins to run, no disability subsequent will interrupt it. But it is otherwise in the presumptive bar by lapse of time; for a disability arising at any period is admissable as evidence to rebut the presumption. 11th John. R. 376, *Jackson* vs. *Delancy*.

2d. Any evidence, tending to show reasons and facts why the suit was not commenced sooner, and within the time, is proper to be admitted to rebut the presumption; and of this character was the evidence of a writ, taken out in season, with the accompanying evidence of Waller; and ought to have been admitted. A writ taken out, though not served, if the transaction were *bona fide*, would go a great length in defeating the presumption. 1 T. R. 271, Phil. Ev. et. Leg. Tidd. pr 21, 3. Day ut Supra, *Cottle* vs. *Payne*; Tayl. R. 155, *Administrator of Quine* vs. *Administrator of Ross*, cited in Phil. ev. 124, n (a.)

Argument for the defendant.—1st. Evidence of the poverty of the defendant, who was the security in this bond, unaccompanied by evidence in regard to Stephen Judd's situation, who was the principal, amounts to nothing.

Evidence of the poverty of either party, is, in its nature, inadmissible. This presumption is founded on the same basis as the statute of limitations, under which such enquiry is not allowed. 1. Vt. R. *Shumway* vs. *Simons*, 57.

The poverty of a defendant should not deprive him of rights, possessed by others, in defending a state claim.

Any thing on this head, in regard to the plaintiff, short of a disability to sue, ought not to go to a jury. It is always difficult to ascertain a man's circumstances; and the

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strongest evidence of poverty would not satisfactorialy explain so long a delay. The poorest man can find the means of instituting a just suit.

The plaintiff's being on the limits of the jail yard, would not prevent his suing, or embarrass him in attending to business of this kind. He was not in close jail.

Mr. Waller's testimony, that Rogers' poverty prevented his getting security for cost on his writ, would be only matter *of opinion*.

2d. Mr. Waller's writ was made only one day before the 20 years had elapsed.

It is believed, that, in this State, 15 years will be the time fixed on in analogy to the longest period of the Statute of limitations. Twenty years in England has been adopted, probably, in analogy to the statute barring the right of entry on lands. 2 Aiken Rep. 269, *Mitchell* vs. *Walker*. There, however, the time fixed upon by different judges has varied from 16 years to 20. If 20 years lacking one day is sufficient, the presumption had arisen before Mr. Waller made the writ. 1 Cowp. 109, *Mayor of Hull* vs. *Homer*; 1 Term Rep. *Oswald* vs. *Leigh*, 270; 7 Johnson, 556, *Clark* vs. *Hopkins;* 1 Campbell, 27, *Caswell* vs. *Budd*.

All the Courts and Judges agree that a less time than 20 years is sufficient, where there are other corroborating circumstances.

It does not appear by the exceptions, that there were, or were not, in this case other corroborating circumstances.

2d. The commencement of a suit within the time fixed by a statute of limitation has no effect, unless it is the suit, in which the plea is made.

This appears clearly by our statute providing, that, when a suit fails through some defect in the proceeding, the plaintiff shall have a year longer to commence a suit. See Cox's Digest, 446.

The opinion of the Court was pronounced by

Hutchinson, C. J.—About twenty-four years had elapsed, after the cause of action accrued upon this bond, before the present suit was commenced. From this lapse of time,

the defendant urges the presumption of law, that the condition of the bond was performed, or the debt paid. All this Court have now to decide is, whether the circumstances on which the plaintiff relied to rebut this presumption of law, were such as the Court ought to have admitted to be proved, and, when proved, ought to have adjudged sufficient to remove the presumption. I use the alternative expression, because the exceptions, agreed to by counsel, leave it not very certain, whether the County Court excluded the evidence, or instructed the jury against the plaintiff upon its legal effect.

The circumstances were, 1st, The poverty and imprisonment of the plaintiff. 2d, The defendant's imprisonment, and the decease of Stephen Judd, the co-obligor.—And 3d, The plaintiff's praying out a writ upon this bond, a day or two before the twenty years expired, and being so poor he could not procure bail to ensure costs, without which his writ would abate.

With regard to these circumstances, it does not appear where or what the plaintiff's imprisonment was, nor that of the defendant. They might both have been imprisoned, not in close confinement, but within the limits of the same prison; and might sue each other daily, notwithstanding such imprisonment. Had either of them been imprisoned in a foreign country, so that he could have no access to the other, or the other to him, and no means of efficiently directing a suit to prevent a presumptive bar, it would have merited a very different consideration.

Again, the poverty relied upon, to have any effect, must be such as to deprive one of all power to sue; not for a day or two merely, but during a great share of the time, while the presumption runs against him. It is not very certain that such poverty ever existed in this state, for any considerable length of time.

The defendant's poverty might render the collection of the debt precarious, and even improbable; and yet furnish no reason why a suit should not be commenced, and the right established, before the defendant's witnesses of performance, or of payment, were all dead, or gone to parts unknown. Besides, in this case, the plaintiff shows in what the defendant's property consisted, to wit, in a mar-

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ble factory. So it seems he had property, and property too, that might have been attached for a debt due from the defendant.

The plaintiff's applying for a writ on his bond, and even obtaining one, amounts to nothing to rebut the presumption of payment, until such writ is delivered to an officer, who would make service of the same, if the debtor was to be found. If otherwise, the creditor might easily keep his bonds alive, without danger of testing the validity of his demand, till his debtor's means of defence were gone, and his witnesses dead. There must be steps taken, which tend to bring the matter to an issue, before the presumptive bar becomes complete. If the application for a writ, and failure to procure bail, could have any effect, it surely could not give four years for the creditor to sleep on his demand, and yet have time given him to collect.

None of the cases, cited by the plaintiff's counsel, support his claim in this. In the case cited from Day's Reports, all that the Court decided was, that the twenty years had not elapsed. The facts, in the action for rent, were such as were calculated to rebut the presumption of payment. The rent was due in England, where the plaintiff lived; and the defendant came to America; and, when enquired of by the plaintiff's agent, denied executing the lease.—And no action could have been brought, with any prospect of recovering judgement, till some person acquainted with the defendant, should arrive and identify him as the person who did execute the lease.

We consider the circumstances relied upon, insufficient in their character to rebut the presumption of payment, which arose from the lapse of twenty-four years.

The judgement is affirmed, with costs.

Doolittle, for plaintiff.

Bates, for defendant.

Collins & Hannby vs. Gibson & Sargeant.

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That a levy of execution upon an equity of redemption is good, when described as all the debtor's equity of redemption in the premises, stating also the nature and amount of the incumbrance, if the execution cannot be satisfied with less than the whole of such equity of redemption.

That an execution, not large enough to take the whole of the debtor's equity of redemption, must be levied upon an undivided portion of the whole.

That, if a defendant, who is lessee of the mortgagor, moves to other premises before the lease expires, that does not prevent his liability to be sued as in possession, unless he surrenders his lease, or at least gives notice to his lessor, that he, for good reasons, is about to leave possession, and abandon his lease.

That the plaintiffs, having a good title against the defendants, who are mortgagor and his lessee, but no title as against the mortgagee, can recover no other damages than merely nominal.

This action was tried in the County Court, at the December Term, 1832, when the following bill of exceptions was allowed, to wit:

This was an action of ejectment for a piece of land in Middlebury village. The suit commenced November 19th, 1831.—Plea, *the general issue*, with a disclaimer as to the defendant, Sargeant.

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The plaintiffs offered in evidence the record of an attachment of all the lands in Middlebury, made on the 3d day of January, 1829, on a writ in favor of the plaintiffs against the defendant, Gibson. Judgement in said suit, and levy of the execution upon said Gibson's equity of redemption in the demanded premises, on the 25th day of January, 1830. The plaintiffs also offered in evidence, the record of a lease of the demanded premises from Gibson to Moses Cutter, for the term of three years from October 15th, 1829, dated November 25th, 1829, an assignment of said lease to Cutter & Rogers on the 17th day of April, 1830, and an assignment of said lease by Cutter & Rogers, to the defendant, Sargeant, on the 11th day of July, 1830; with evidence tending to show, that said Sargeant went into possession of said premises under said lease soon after the assignment of it to him; and continued in possession of the same until the commencement of the present suit; accompanied with proof, that the sum of one hundred and twenty-five dollars was the yearly value of the rents of said premises. The defendants offered in evidence the record of a judgement in favor of Ira Stewart in ejectment for

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the same premises against said Gibson, upon mortgage; to which suit the present plaintiffs were not parties, with time to redeem, which would expire on the second Tuesday of December, 1831: all of which evidence was admitted by the Court. And the plaintiffs contended, that they were entitled to a judgement for the possession of the premises, together with the rents and profits as damages, from the 25th day of July, 1831, to the time of the commencement of this suit. The Court decided, that Sargeant having gone into possession of the premises under a lease, which was unexpired at the time of the commencement of the plaintiff's action, he must be regarded as a tenant in possession, until he formally abandons his lease, and gives the plaintiffs notice of the same; and rendered a judgement for the plaintiffs to recover the possession of the premises: but refused to render judgement that plaintiffs should recover the rents as damages. It appeared that said Sargeant had removed his goods from said store, and occupied another store, before the suit was brought; but no other evidence was offered of a surrender, or abandonment of his lease.

To which decision of the Court, refusing damages on the judgement, the plaintiffs except. And the defendants except to the decision of the Court as to the necessity of an abandonment on the part of Sargeant. Exceptions allowed, and the case now comes here for revision.

Argument for the plaintiffs.—The plaintiffs having levied their execution upon the equity of redemption of Gibson in the demanded premises, were entitled to the possession of the premises after the six months redemption had expired.—Stat. 211, Chap. 28, Sec. 6.

The attachment of the plaintiffs being prior to the date of the lease, under which the defendant, Sargeant, had possession of the premises, the lease gave Sargeant no title to the possession as against the plaintiffs; and Sargeant having gone into possession under the lease, which had not expired at the time of the commencement of plaintiff's action, must be regarded as the *tenant in possession*, until he formally abandoned the premises, and gave notice of such abandonment.

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The Court having decided, that the plaintiffs were entitled to a judgement for the premises, should also have given judgement for the plaintiffs to recover the rents and profits as damages.—Stat. p. 84, Chap. 7, Sec. 88.

The judgement in favor of *Stewart* vs. *Gibson*, upon Stewert's mortgage, can have no bearing upon the rights of the parties to this suit. The present plaintiffs were not parties to that suit; and their rights can in no way be affected by the judgement. It affords the defendants no ground of defence in this action; and as Stewart has made no claim for rents and profits in his suit against Gibson, he must be regarded as having waived all claims to the same

Argument for defendants.—The levy of execution on the equity of redemption is void. That levy should be on the land subject to the incumbrance.—1 Vt. R. 101, *Payne* vs. *Webster*.—1 Vt. R. 303, *Arms* vs. *Burt & al.* Plaintiffs show but an equitable interest, which cannot be set up against a legal title.—2 John R. 84, 221.—3 John. R. 424.—1 Day, 70. In ejectment the plaintiff must show a right of entry, at the time of commencing his action, and at the time of trial.—1 Vt. R. 244, *Cooley* vs. *Penfield*. The legal title and possession were in Stewart at the time the plaintiffs commenced their action; and the plaintiffs had neither title, possession, nor the right of possession; and cannot sustain this action.—Bull, N. P. 110.

A mortgagee in ejectment may recover rents and profits.—Bray. R. 166, *Stanbury* vs. *Dean*. In this case Stewart was entitled to the rents and profits.

Ejectment will not lie for an equity of redemption: it is not visible or tangible, and of which the Sheriff can put the party in possession.

The action is awkwardly brought to recover the mesne profits. But ejectment will not lie, and by the levy, plaintiffs acquired no right to possession. The only mode, by which the creditor, in any execution levied on land, can recover mesne profits of the debtor, is by action on the case, after having the profits and improvements appraised, as described by the statute.—Vt. Stat. p. 211–12; and this only in case the estate is not redeemed within six months;

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and the creditor has a right to enter and take possession. Stewart had the right of possession and has taken it.

This mode is not known to the common law. The plaintiffs had no right to the possession at the time of commencing their action, or at the time of trial. The equity of redemption was, as to being of any value, contingent. In this case, as the contingency fell out, it was of no value, as the estate was not redeemed. So that the plaintiffs acquired nothing by the levy.

At the time of the levy, Gibson had no right, but the equitable one of redeeming; and, when that was foreclosed, his right wholly ceased and became extinguished: and the plaintiffs can have no greater right than Gibson, who then had neither legal title, or actual possession, or right of possession. Plaintiffs must recover, if at all, on the strength of their own title—not on the weakness of def'ts.

On the second plea, Sargeant was entitled to judgement in his favor. By the plea of disclaimer, he placed on record a full denial of title, possession, or right of possession, which is conclusive against him ever after. And the circumstance of producing a record of a lease of an unexpired term, was not sufficient to countervail the plea of disclaimer, connected with the fact, that he had wholly abandoned and quit the possession two months before the action was commenced.

A party has a right to abandon his title or possession, or both, whenever he pleases.

It is a rule in ejectment, that the plaintiff must prove the defendant in possession, at the time the suit is commenced; and, failing in this, the defendant will recover his costs.—Vt. Stat. R. L. p. 85.—7 T. R. 327.—1 Bos. & Pul. 573.—1 Chit. Pl. 191.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—It appears by the Bill of exceptions in this case, that the plaintiffs having a demand against Gibson, one of the defendants, attached, and, afterwards, levied upon Gibson's equity of redemption of the premises in question, he having before mortgaged the same to one Ira Stewart. The plaintiffs claiming under this levy, the defendants object to it as irregular, it being not a levy

upon the land, but upon the equity of redemption in the same. The debt of the plaintiffs was so large, it swallowed up the whole equity of redemption of Gibson. There was, therefore, no need of such a description as would have been necessary, if the levy had left Gibson an interest remaining there. In such case, the levy must have been made upon some given undivided portion of the whole premises, one fifth &c. leaving, perhaps, an undivided fifth still belonging to Gibson. But as the debt of the plaintiffs took all Gibson's right, and as the plaintiffs could not hold at all against Stewart, but their levy gave them the right to redeem from Stewart's mortgage, and, when such redemption was made the whole title would be in the plaintiffs. This levy upon all the defendants equity of redemption is good under our statutes. See pages 80 and 216. The cases of *Paine* vs, *Webster* and *Hathaway and Burt* vs. *Stoddard*, cited by the defendants' counsel have no application upon this point. In both these cases, the levy upon all the debtor's right &c. was adjudged ill. But there was no way of ascertaining what that right or interest was, in either case; nor did it appear what the appraisers considered it to be. There is no such difficulty in the present case. The officer's return shows, that the appraisers considered Gibson's interest to be what the records show it to be: to wit, the whole land, subject to an incumbrance, which they definitely describe. This objection to the plaintiff's levy cannot prevail.

The defendants also object to the decision against the defendant, Sargeant, holding him as in possession, notwithstanding his disclaimer. There are two answers to this objection. 1st. The case shows that there was testimony, tending to show Sargeant in possession, under the assignment of the lease, until the commencement of this suit; also testimony of his leaving the possession some weeks before that time. It might have been decided against him upon the weight of evidence. This would be a sufficient answer, unless a decision upon the other point may have prevented a decision upon this; which is probable. 2d. The defendants liability to this action cannot be at all affected by his moving out of this shop and occupying another, with his lease continuing in full force, and

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he continuing liable to pay rent. It is not very certain that his surrender of his lease would avail without an acceptance of such surrender by the lessor, or the assignor. It surely would require proof of good reasons for such surrender, to make the same, without acceptance put an end to the lease, and to his liability to pay rent. But there is nothing of this in the case. There is no surrender, nor any notice, that he was about to leave possession. The decision of the County Court, upon this point, was correct.

There was one exception taken by the plaintiffs, to a decision against them. They claimed the full amount of rents and profits; and the Court decided, that they should recover nominal damages only. Their decision upon this point was correct. Also, Stewart, the mortgagee of Gibson, has a controlling right to the rents and profits. The plaintiffs have no right against Stewart but to redeem. If they take possession, they must pay him for the rents and profits until redemption. They recover in this action merely on the ground, that their title is good against Gibson and those claiming under him. But their title is not good against these for the damages, which belong to Stewart.— To him these defendants are liable. And it does not differ the case, whether Stewart insisted upon these rents, when he took judgement, or the same were then forgotten, or whether he intended to relinquish the same. If it was a mistake, possibly he might obtain a new trial on some terms or other, and still include them in his judgement.— if he yielded them voluntarily, it was for the benefit of the defendants, not of the plaintiffs.

The plaintiffs are not liable to Stewart for the rents and profits, accruing before they obtained possession. After that they will be liable until they redeem. The case presents no date of Stewart's mortgage or judgement. But the counsel of both parties treat them as prior to the commencement of this action; but consider the time of redemption as not having expired. So we treat the subject.

The judgement of the County Court is affirmed.

Doolittle, for the defendant.

O. Seymour, for the plaintiff.

Henry W. Fullerton vs. Seymour & Holley.

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Where a note is made payable to A. & B. or order, partners, evidence of an indorsement of the partnership name by one of the firm, without an averment of partnership in the declaration does not meet the averment that "A & B. indorsed said note, their own proper hand writing being to such indorsement subscribed."

This was an action of Assumpsit, tried at the County Court, December Term, A. D. 1833.

The declaration was in the usual form counting upon a promissory note, dated November 2d. 1832, executed by the defendants to Grant & Seaver, or order, of Boston, for the sum $911,43, and as having been indorsed to the plaintiff by said Grant & Seaver, with the usual averment "*their own proper hand writing being to such indorsement subscribed.*" But the declaration contained no averment that Grant & Seaver were partners, or were acting under a firm of that name.

The plaintiff offered in support of his declaration a note given by defendants to Grant & Seaver, answering the description in his declaration, indorsed as follows: "Pay the contents of the within to Henry N. Fullerton without recourse to us. GRANT & SEAVER."

This was accompanied by the testimony of a witness, who stated that he had done business with a firm under the name of Grant & Seaver in Boston, and that they were partners under the firm of Grant & Seaver, and that the endorsement was in the hand writing of said Grant. To all which evidence the defendants objected; but the Court overruled the objection, admitted the evidence, and gave judgement for the plaintiff. To which decision of the Court the defendants excepted; the cause passed to the Supreme Court for revision.

The opinion of the Court was delivered by

Baylies, J.—The defendants on trial before the County Court contended, that there was a variance between the averment in the declaration, and the indorsement on the note: the averment is, "that Grant and Seaver indorsed said note, *their own proper hand writing being to such indorsement subscribed.*" Whereas the evidence is, that the indorsement is wholly in the hand writing of Grant. As

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there is no averment in the declaration, that *Grant & Seaver* were partners, or were acting under a firm of that name, we are inclined to believe, that the indorsement made by *Grant* alone, does not prove the averment, "*that Grant & Seaver indorsed said note, their own proper hand writing being to such indorsement subscribed.*" *Levy* vs. *Wilson*, 5 Esp. N. P. R. 180; *Pease et al* vs. *Morgan*, 7 J. R. 468.

Therefore, it is considered, that the County Court erred in deciding there was no variance, and their judgement must be set aside, and

A new trial granted.

Waller, for plaintiff.
O. Seymour, for defendants.

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Benjamin Marshall vs. Nathan Wood et al.

A promissory note, described in the condition of a mortgage, need not be produced on the trial of an action of ejectment brought on such mortgage; provided the equity of redemption had been released by the mortgagor to the mortgagee in satisfaction of the note.

Where the release of the equity of redemption is by a warrantee deed, the mortgage is not merged in such deed, where it is not for the interest of the mortgagee to have it merge.

To bring an action of ejectment against several persons, who occupy different rooms in the plaintiff's building, is not a misjoinder of defendants—each may plead severally *not guilty* as to the room which he occupies, and *disclaim* as to every other room.

The effect of a *disclaimer* at common law.

This action was brought against Wood, Seymour and others, who occupied a certain building situated on land to which the plaintiff claimed title by virtue of two several mortgage deeds, executed and delivered by one *James W. Stephens*, the former owner.—One of them to a man named *Grimshaw*, dated the 14th day of December, 1825, and assigned to the plaintiff the 5th day of October, 1827—the other to a man named *Boisgerard*, dated the 18th day of February, 1826, and assigned to the plaintiff the 25th day September, 1827.

It appeared, that after the execution of said mortgage

deeds, and while Stephens remained in possession, to wit, in the fall of the year 1827, he made a verbal agreement with one *Joseph Hough*, by which *Hough* was to erect the building, and use it for five years; after which he was to take it off from the land, or receive for it the sum of $1000. It further appeared, that after the building was erected by *Hough*, to wit, on the 12th day of August, 1826, Stevens conveyed all his real estate, including this, to one *Ira Stewart* and others, in trust, for the benefit of certain of his creditors; and that the said *Stewart* subsequently, on the 12th day of July, 1830, procured to himself in his own right a deed from *Hough* of the building; and afterwards, on the 11th day of October, 1830, conveyed one moiety of the same to *Nathan Wood*, one of the defendants.

It further appeared, that said *Stewart*, and one of the other persons named in the trust deed, on the 16th day of May, 1831, conveyed to the plaintiff, *Marshall*, their right of redemption, in the whole of the mortgaged premises, which had been assigned to them in the manner above mentioned, and gave said *Marshall* possession thereof. They also conveyed, at the same time, to said *Marshall*, other property not included in the mortgage, to the amount of $4000; and it was then agreed between the parties to the conveyance, that *Marshall* should hold and own, three-fifths of the property thus conveyed to him on account of his mortgages, and that *Stewart*, the acting trustee, should have and hold the other two-fifths.

It appeared, that while the building was occupied by *Hough*, and until the commencement of the suit, it had been occupied in a separate and distinct manner—one part for a lawyer's office, and the other part for a store; and that *Seymour*, one of the defendants, was a lawyer, and had occupied the office under *Hough & Wood*,—the other defendant had occupied the store under the trustees, and by an agreement with said *Stewart*, without any connexion or privity whatever, and were so occupying when the trustees deeded to *Marshall* as aforesaid.

The case was tried by the Court by consent of parties, and the counsel for the defendant requested the Court to decide.

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First, That under the above circumstances, it was incumbent on the plaintiff to produce the obligations secured by the mortgage, or they would be presumed paid or cancelled and taken up; or, at least, necessary to explain why they were not produced.

Second, That whatever name the parties might have given to the conveyance to Marshall, that circumstance and the contract connected with it, was *prima facie* an extinguishment of the mortgage.

Third, And that the plaintiff could not join different persons in the same suit between whom there had been no privity, concert or connexion in the possession of the different apartments of said building.

But the Court decided in favor of the plaintiff upon each of the above points. To which the defendants made the exceptions which are now presented for the consideration of the Court.

Counsel for defendants contended,

1st, That it was incumbent upon the plaintiff to produce the obligations secured by the mortgages, or they would be presumed paid and cancelled, or taken up; or it was at least necessary for the plaintiff to explain why they were not produced.—3 Vt. Rep. 202, *Edgell* vs. *Stanford*.

2d, That whatever name the parties might have given to the conveyance to Marshall, that circumstance and the contract connected with it, was *prima facie* an extinguishment of the mortgages.

3d, That the plaintiff could not join different persons in the same suit between whom there had been no privity, concert or connexion in the possession of the different apartments of said building.

Counsel for plaintiff.—The mortgages in favor of Grimshaw and Boisgerard, executed by James W. Stephens, and which included the premises in question, had been assigned to the plaintiff long previous to May, 1831; and on the 2d of May, 1831, the plaintiff received possession of the mortgaged premises from the assignees of said Stevens; and on the 16th of May, 1831, the assignees quit-claimed the same premises to the plaintiff, in whom the title still remains.

1st. A release of the equity of redemption by the mortgagor, does not discharge the title of the mortgagee under the mortgage, even though the notes or bonds secured by the mortgage be given up to the mortgagor.—See 6 Con. Rep. 375, *Lockwood* vs. *Sturtevant*.

2d, The deed of one half the store from Stewart to Wood (which did not include the land on which it stood) was subject to the rights of the assignees, and was liable to be disposed of by them under the trust deed.

3d, The action is well brought against all the tenants in possession.—See Stat. p. 85, sec. 39. The tenants can disclaim for such part of the premises as they are not in possession of.

The opinion of the Court was delivered by

Baylies, J.—The defendant's counsel requested the Court to decide; 1st. That under the above circumstances, it was incumbent on the plaintiff to produce the obligations secured by the mortgage, or they would be presumed paid, or cancelled, and taken up; or at least, it was necessary to explain why they were not produced.

When the equity of redemption is foreclosed by a decree of a Court of Chancery, or is released by the mortgagor, or by his assignee, to the mortgagee, or to his assignee, the title, which was conditional, becomes absolute; and it cannot be necssary, for the mortgagee, or his assignee, to preserve the note, which is described in the condition of the mortgage, to keep good his title; nor produce the note to maintain ejeotment brought on the mortgage. The presumption is, that if the mortgagor released his equity of redemption to satisfy the note, the note was given up to him by the mortgagee, at the time, to be cancelled. But if the mortgagor has never released his equity of redemption, this presumption cannot arise; and if the mortgagee is unable to produce the note, the presumption is, that the morgagor has paid it, and taken it up; not by a release of the equity of redemption, but in some other way. It was on this presumption, that a majority of this Court decided, that the mortgagee could not maintain ejectment against the mortgagor, without producing the note described in the condition of the mortgage. See *Edgell* vs. *Stanford*, 3

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Vt. R. 202. But this decision is not applicable to the case at bar.

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Second Request: To decide that whatever name the parties might have given to the conveyance to Marshall, that circumstance, and the contract connected with it was, *primâ facie* an extinguishment of the mortgages.

It has been often decided, that where the mortgagor has by deed conveyed his equity of redemption to the mortgagee in satisfaction of the note described in the condition of the mortgage, the mortgage becomes an absolute title, and is not merged in the conveyance of the equity of redemption, if such merger would operate to the injury of the mortgagee. See 1 Chip. 448; 2 Con. Rep. 161; 6 Con. Rep. 388-9; 3 J. C. R. 53. The County Court did not err in disregarding this request.

Third. That the plaintiff could not join different persons in the same writ between whom there had been no privity, concert, or connexion in the possession of the different apartments of said building,

The plaintiff having bought the building in question, and having found the defendants in possession, was not obliged to enquire how they came there; nor what division of his property, they had made among themselves; but he might bring his action against them all, jointly; and if any one does not choose to be responsible for the others, as to the rents and profits, he may plead severally, *not guilty*, as to that part of the building in his possession, and disclaim as to every other part. Or if he was in possession of no part of the building, when the writ was served, he may disclaim as to the whole. This proceeding in ejectment is allowed by Statute, Chap. 7, p. 89, which says, "The writ shall not be abated because all the tenants are not sued; but those on whom service is made, shall answer for such part of the premises only as he, she or they shall distinguish, and set forth in his, her or their plea, and *disclaim* the remainder. And if any shall disclaim the whole unless the plaintiff shall prove such *disclaimer's* possession, of all, or part of the premises demanded, such *disclaimer* shall recover costs against the plaintiff." The word, "*disclaimer*," in the Statute, is improperly used for defendant.

The notion of a disclaimer in our action of ejectment

seems to have been borrowed from the common law proceedings in real actions.

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"But as a disclaimer was never at common law, pleaded *in bar of the action;* so neither was it, strictly speaking, a plea *in abatement.* It did not give the demandant a *better writ.* It contained no *traversable fact.* It was, in effect, *an offer* by the tenant to yield to the claim of the demandant, and to *admit his title* to the land." See Stearns on Real Actions, 223.

Whether a disclaimer under our Statute does in its effects differ from a common law disclaimer, we are not called upon to decide. But we are all satisfied, that in this action there was no misjoinder of defendants.

The judgement of the County Court is affirmed.

Bates, for defendants.

Phelps & Bell & Starr, for plaintiffs.

Seymour Sellick vs. Peter Starr.

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That a lease of land for the life of lessee may be presumed, as well as any other estate, when the facts proved, are calculated to raise such presumption.

That a purchaser, from the original owner, is bound to notice such a possession, and can only hold subject to it.

The case came up from the County Court upon the following bill of exceptions:

This was ejectment for the land on which the office of the defendant stands, in the village of Middlebury.

Plea, *Not guilty*, and trial by jury.

The plaintiff gave in evidence two deeds from Gamaliel Painter to Epaphras Miller; one bearing date December 6th, 1800, and the other August 9th, 1805; and proved, that the spot of ground in question is contained in one or both of these deeds. And it was admitted, that said Painter had a good title. The plaintiff also gave in evidence a deed of the premises sued for, from said Miller to himself, dated October 16th, 1827.

The defendant gave in evidence a deed from said Miller to himself, of a piece of ground about twenty-three feet long and sixteen feet wide, situate near the spot in question; and also a lease from said Miller to himself of the

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same land; the deed being dated August 9th, 1805, and the lease March 10th, 1808.

It appeared that, immediately after the execution of said deed to the defendant, in 1805, he erected the office aforesaid on the land described in said deed and lease; and occupied the same until some time in the year 1810, when he removed to the office formerly occupied by the late Samuel Miller, and continued there until September, A. D. 1812.

It further appeared in evidence, that, soon after the defendant had so removed, the said Miller, wishing to erect a large building on the land which was in part covered by the defendant's said office, agreed with the defendant that said office should, at the expense of said Miller, be removed to another place on said Miller's land, and fitted up for use: that, while the defendant should continue in the office, to which he had removed, he should enjoy the same, free of rent; and the said Miller, during the same time, should have the rents and profits of the office in question: but that the defendant should have a right to return to his former office at any time within two years. Said Miller did thereupon remove the office in question to the place where it now stands, and there fitted it up for use, and rented it until September, 1812, when the defendant returned and took possession of it. In the mean time, said Miller had occupied the ground from which said office was removed, by erecting a large building on that and other adjoining ground; which building is yet standing.

It further appeared, that the defendant had occupied the office where it now stands, from the time of his so resuming possession of it in September, A. D. 1812, till the present time, without any payment or demand of rent, or any stipulation for rent; and that he had, on several occasions, asserted, that he owned a life estate in the office and land; but no conveyance or writing was shown from Miller, or any other person, to the defendant, in relation to the land where said office stands. Said Miller being a witness, testified, that he had given no deed or writing to defendant.

It further appeared that, shortly before the date of the deed from Miller to the plaintiff, an arrangement began to be talked of between said Miller and the defendant, by

which said Miller was to remove said office to another place on his land; and the defendant, with said Miller, and also with the plaintiff, examined the new location for said office. The arrangement for the removal was agreed on about the time of the date of said deed to the plaintiff: and, after the date of said deed, the plaintiff, being about to leave home, appointed said Miller to superintend the removal. And the defendant having prepared the office to be removed, said Miller commenced the removal, and drew it from off its foundation into the highway: and, a dispute arising between him and the defendant respecting the position in which the office was to stand in its new location, the defendant prevented the further removal—replaced the office on its former foundation, and has there occupied it ever since. Some time after this, the action was commenced; and there was no evidence of any communication between the plaintiff and Miller or defendant, in relation to said office or land, from that time till this action was brought.

The defendant contended, and requested the Court to charge the jury, that, on this showing, he was entitled to hold a life estate by the Statute of Limitations, or presumption of a grant of such estate. But the Court refused so to charge; but instructed the jury, that, on this showing, the defendant did not appear to have acquired any legal right, by which he could resist the action; and that the plaintiff was entitled to recover for the use of the land, not of the office, after it was replaced as aforesaid.

Verdict and judgement for the plaintiff. And to the decision and charge aforesaid, the defendant excepts. Exceptions allowed, and passed to the Supreme Court.

Argument for the defendant.—1st, The lease from Epaphras Miller, bearing date in 1808, of the land, on which defendant's office then stood, was a lease for *the life of the defendant;* and the contract, under which the removal of the office by Miller in 1810 was made, was a contract for the exchange of the two pieces of land between the parties, and was followed by the exchange of possession. In the case of the exchange of lands, or any freehold interest therein, *without deed*, followed by a change of possession, the continued possession of the parties for fifteen years,

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completes the title in each. It is a *contract executed*; and the Statute of Limitations operates to confirm the title.—The defendant had occupied the ground, where his office now stands, about eighteen years previous to the bringing this action.—See 2 Black. Com. 323.

2d, The arrangement for another exchange in October, 1827, does not *alter* the rights of the parties. It did not proceed, *so far as it did proceed*, upon any claim of right by Miller, or the plaintiff. It was an arrangement for mutual accommodation, without any consideration, it not being carried into effect. It was no waiver of any right by the defendant.

3d, By lapse of time, Miller's title is complete to the land, where the office originally stood. The defendant is divested of his interest there. If he is not to hold the land, on which his office now stands, for life, it is giving effect to a fraudulent act in Miller and the plaintiff to dispossess the defendant. The deed to the plaintiff, from Miller, was not perfected by acknowledgement, until just before the commencement of this action, when the possession of the defendant was adverse to Miller, as it was also at the date of the deed in October, 1827.

4th, The Court erred in not charging the jury, that from the length of time the defendant had had the exclusive possession of the premises, they were at liberty to presume the execution of a lease of the premises in question, by Miller to the defendant for his life.—See 1 Swift's Digest, 165–6.—2 Saunders' Rep. 175, *a* —3 Term Rep. 159, *Read* vs. *Brookman*.—1 Bos. & Pul. 400, *Holcroft* vs. *Heel*.—5 Cranch, 276, *Hepburn* vs. *Auld*.—5 Con. Rep. 302, *Camp* vs. *Camp*.

5th, The Court erred in charging the jury, that the plaintiff was entitled to recover as damages, a ground rent from the date of his deed, viz. in October, 1827: whereas the defendant had no notice of any deed to the plaintiff, nor had the plaintiff made any claim of the defendant until the commencement of this action.

Argument for the plaintiff.—1. As Mr. Starr went into possession of the disputed premises under Mr. Miller, and by his consent, and never gave him notice of any adverse

claim, their respective rights must depend upon the contract or understanding. And, as between them, the Statute of Limitations could have no operation. It can hardly be necessary to state the familiar principle, that the statute attaches only to an adverse claim, and such an invasion of the owner's rights as he might, and ought to redress by suit.

2. The Statute of Limitations, which provides, that no action shall be brought but within fifteen years after the entry upon land, has been construed to confer a good title in fee, upon an individual, who has been in possession claiming title fifteen years. But it is denied, that an estate for years, or for life, can be acquired in this way.—These are particular estates carved out of larger estates, and imply a *superior*, under whom the right it enjoyed.—2 Aiken, 269, *Mieckell* vs. *Walker*.

3. But however the case might be between *Miller* and *Starr*, the latter had no paper or recorded title; nor does it appear, that Sellick had any notice of any right, or claim, of Starr to the premises.

In such a case, the circumstance that Starr occupied the premises, could not be regarded as notice to Mr. Sellick of some invisible, disputed claim.

But if, in any case, the possession alone would be sufficient to put the purchaser on the guard, and induce enquiry as to the right; it is sufficient in this case, that Mr. Starr consented to remove.

Mr. Sellick found the title to the premises in Mr. Miller, and Mr. Starr in possession. Mr. Starr, without any pretence of a claim, consented to remove, and Mr. Sellick purchased. It would be strange if his claim could be defeated.

HUTCHINSON, C. J.—This is an action of ejectment for the land on which the defendant's office stands. The plaintiff claims title to the same by virtue of a deed from Epaphras Miller.

The defendant contends, that he ought to be protected in his possession, either by the Statute of Limitations, or the presumption of a grant, or lease, from said Miller, of a life estate in the premises. He urges this from various circumstances, detailed in the bill of exceptions.

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It there appears, that the defendant had a deed and lease for his life, from Miller, of the other piece of land, on which the defendant's office was first erected; that Miller, with the consent of the defendant, moved the defendant's office from said premises, where it was erected, on the defendant's life estate, to its present location, and erected a permanent building where this office first stood, and extending on to land of said Miller, where he has occupied it till his title has become established by the Statute of Limitations, if he claimed to possess in his own right, as appears probable by the bill of exceptions. It also appears, that the defendant has occupied his office, in its present location, more than fifteen years—ever since September, 1812, without paying rent, and without any demand of rent by Miller; and that the defendant several times asserted, that he had a life estate in the office and land. The defendant contended, that all these circumstances together were sufficient to warrant such presumption, without showing a deed or lease; notwithstanding Miller testified, that he never gave any deed or lease, as he recollected.

We cannot read this statement without strongly suspecting, that it was probably the understanding of Miller and the defendant, that the defendant should occupy his office, in its new location, as long as he would have had a right to occupy it, in its first location. And, after fifteen years possession, perhaps after a shorter period, the defendant possessing without demand of rent, it ought to be presumed, or rather, the jury might well presume, that such understanding was perfected by a life lease, in the outset; though that lease is not now to be found, nor is recollected by Miller.

Indeed, a contrary position would seem incredible, either in reference to Starr or Miller. That Starr should permit Miller to move his office from his own life estate, upon land of Miller, and erect upon this life estate a permanent building for the use of Miller, and extending to Miller's other lands, and the defendant have no compensation for this, and have no security against his being ousted any day, is not easily to be credited. Nor, can we believe, that Miller did all this without some security that the defendant should not claim possession, during his life,

of the portion of this new building, which stood on the defendant's life estate. And the longer the parties acquiesced in this new arrangement, and peaceably occupied the respective buildings in conformity with it, the stronger is the presumption, that each confirmed the exchange by an appropriate conveyance to the other. The eighteen years possession by each, with no demand of rent, and no marks of acknowledged tenancy, is sufficient to put the question at rest during the life of the defendant. Any thing is to be presumed ,which might lawfully exist, to quiet so long a possession. In 4th Term Reports, 682, *Syburn* vs. *Slade*, the lessors of the plaintiff produced a lease from one *Geo. Pym*, who had been of age about four years. It appeared, that the estate had been given by will to trustees, in trust to convey to George Pym on his arriving at the age of twenty-one years. The plaintiff was nonsuited because the legal title was in the trustees. The nonsuit was set aside in Bank; Lord Kenyon and the whole Court agreeing, that there was no reason why the jury should not have presumed a conveyance from the trustees to George Pym; adding, it was their duty to have thus conveyed, and it must be presumed they did their duty.

In the 11th of East. Rep. 376, *Trustees* vs. *Merryweather*, it was holden, that six years use was sufficient to found the presumption of a dedication.

In the 4th of Term Rep. 468, *Wilkinson* vs. *Payne*, the suit was brought upon a note, which appeared to have been given to induce the plaintiff to marry the defendant's daughter. The defence was, that, though the plaintiff in fact married the daughter, the marriage was not legal; and the marriage, shown on trial, was not legal. The plaintiff's wife had died three weeks after he became of age. Till then, they lived together as husband and wife; and were so treated by the connexions, and by the defendant himself. It was left to the jury to presume a legal marriage after the first, which was not legal. This they presumed accordingly; and the Court refused to grant a new trial. This must have been a very short period, though the exact length of it does not appear.

In 1st Phil. Ev. 129, marginal page, is a long note, citing several cases in support of a similar doctrine.

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In Gray's case, 5 Coke, p. 79, one prescribed for right of common, and obtained a verdict. But as the evidence was, that he paid the annual rent of a hen and five eggs, a question arose, whether the verdict could stand, unless it were also found that he punctually paid this rent. But the Court said the landholder might distrain for the rent.

The defendant's possession would warrant the presumption of a seizin in fee, were it not for the proof of his taking possession under Miller. But that proof must be taken in connexion with the circumstances of the possession. If he paid rent, he must be presumed to hold on payment of rent. If he pays no rent, and none is demanded, it must be presumed that he was to hold without payment of rent. But the defendant's possessing in the new location of his office without paying rent, instead of the place where he had a life estate without paying rent, affords a presumption, that he had a life estate in the new location of his office, according to his claim, several times expressed.

In the 1st of Phil. Ev. 127, marginal page, it is said, "The usage, which is supposed to be founded on a grant or agreement, determines also the extent of the supposed grant. The right granted is considered to be commensurate with the right enjoyed." This, as applied to the case before us, is the defendant's enjoying without rent, is evidence of a grant, that he should enjoy without rent. This, of itself, would tend to show a grant in fee; Miller always living in sight of the premises. But, when it is also proved, that he held under Miller, and held this instead of the other piece, in which he clearly had a life estate, the whole tends to show, and would well warrant the presumption, that Miller had executed to the defendant some instrument, which vested in him a life estate in the premises.

This would decide the case, as between Miller and the defendant. But the plaintiff contends, that he is not to be affected by those circumstances, now urged by the defendant, which do not appear of record. It has been decided, that nine years possession under a contract for a deed and an unrecorded deed, was sufficient notice to an after at-

taching creditor, who procured his attachment to be first recorded. See 2 Vt. R. 544, *Rublee* vs. *Mead*. ADDISON, *January*, 1833.

Here was a possession of eighteen years, of which the plaintiff could take notice as well as courts and jurors.—And he ought to draw the same presumptions from such possession as they would draw. If he would claim any thing from seeing the office about to be removed from the premises, by consent of the defendant, he ought to have seen the thing perfected before he relied upon it.

Upon a full view of the case, the judgement of the County Court is reversed, rnd a new trial is granted.

Starr, Phelps and Bell, for the defendant.

Bates & Chipman, for the plaintiff.

AZARIAH ROOD VS. IRA SCOTT & SOL. PARKER.

ADDISON, *January*, 1833.

If an officer take into his custody personal property by writ of attachment, and a third person receipts the property, and suffers it to go back into the hands of the debtor, the officer by taking the receipt does not part with his lien upon the property. But if the officer take the same property into his custody by virtue of a second writ of attachment and keeps it from the receiptor, this will discharge the receipt.

The plaintiff was a Sheriff's deputy, and brought the action on a receipt of property taken by him of the defendants for a yoke of oxen attached in a suit in favor of Asa Chapman against one Ebenezer Scott, the defendants agreeing to redeliver said oxen on demand, &c., in the usual form. The property was seasonably demanded by the plaintiff of the receiptors on the execution in favour of said Chapman, but was not redelivered, and this action was commenced against them. The case comes here upon a bill of exceptions; but the facts are fully stated in the argument of the counsel and the opinion of the Court. The bill of exceptions contains much evidence on both sides upon the contested point, whether the oxen were when taken the second time by the plaintiff in the possession of Ebenezer Scott or Ira Scott, one of the receiptors. But this ground being conceded to the plaintiff in the decision of the Court the evidence in relation to it is properly omitted.

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Phelps & Bell for plaintiff.—The Court decided correctly in holding the defendants liable on their receipt.

It was true that the property in question was sold on another process by the plaintiff; but that circumstance furnishes no defence on this case.

After the receipt in question was given, the property was permitted to go back into the possession of the original debtor and became liable to be attached by other creditors. It was so attached and holden by the after attachment. Under these circumstances the only remedy by the plaintiff was on his receipt.

It certainly is immaterial what disposition was made of the property by the receiptor if it cannot be legally held to respond the attachment. Suppose it had been sold by the original owner after it came back into his possession. The plaintiff could not lawfully take it, but must look to his receipt.

The circumstance that the subsequent attachment was made by the plaintiff is not important. He was the mere instrument of the creditor. The property was subjected to the lien of the creditor last attaching; and the plaintiff was bound to sell on the last process. It was the act of the creditor which fixed the lien, and not that of the officer.

The opinion of the Court was delivered by

BAYLIES, J.—It appears from this case, that the plaintiff was deputy sheriff, and as such did by writ of attachment in favor of Asa Chapman, and against Ebenezer Scott, take a yoke of oxen, on the 29th July, 1830. And on that occasion Ira Scott and Sol. Parker gave their receipt in writing of that date to Mr. Rood, the plaintiff, for the oxen, promising to return them to the plaintiff when demanded.

In this action Mr. Chapman recovered a regular judgement against the said Ebenezer Scott, took out a writ of execution thereon, and delivered the same to said Rood, deputy as aforesaid, in due season to continue the lien upon said oxen, acquired by said attachment. But the oxen, when demanded on the receipt of defendants, were not returned to the plaintiff to be sold on said execution. So the plaintiff brings this action against the defendants, on

their receipt, for not returning the oxen according to their promise. The defendants, *by way of excuse*, says, that the plaintiff, before the rendition of said judgement, took the oxen into his own possession, and kept them from the possession of the defendants, as he had a right to do; and thereby put it out of the power of the defendants to return the oxen to the plaintiff, when he demanded them on said receipt, to be sold on said writ of execution.

The plaintiff admits all this to be true; but says, he took the oxen out of the possession of Ebenezer Scott on a writ of attachment against him, and in favor of L. B. Fillmore, who directed said oxen to be taken on the 2d October 1830; and afterwards sold the oxen on Fillmore's writ of execution to satisfy his demand. Moreover the plaintiff says, that the oxen, after they were receipted by the defendants, were often in the possession of Ebenezer Scott, he exercising acts of ownership over them.

If the law permitted the plaintiff to take, and keep the oxen in his possession, after the execution of the defendant's receipt; and thereby put it out of the power of the defendants to return the oxen to the plaintiff when demanded, and subjected the defendants to pay for the oxen for not returning them, it would be strange indeed. But the law is not so unreasonable.

At an early day, it was decided in this State, that if an execution be levied on personal property, and by the officer making the levy, it was delivered to a third person for safe keeping, on a receipt containing an engagement to deliver the property to the officer, the officer does not thereby part with his lien on the property, but he may take it into his possession at any time. *Pierson* vs. *Hovey et al.* 1. D. Chip. 51.

So in another case, "an officer, by the direction of the creditor's attorney, attached certain personal property of a debtor by virtue of a writ of attachment, and delivered the same to a third person, who executed his receipt therefor to the officer, promising to redeliver it on demand, and then permitted it to go back into the possession of the debtor. Afterwards the attorney took out a writ of attachment in his own favor, against said debtor, and gave it to the same officer, with directions to attach the same

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property, which was done accordingly. Judgement having been rendered in this last suit, the property was sold on the execution issuing thereon. It was held in an action brought by the officer on the receipt, taken on the first attachment, to recover the value of the property, that the suit could not be sustained. *Beach* vs. *Abbott & Blodget*, 4 Vt. R. 605.

This case is a precedent for the one at bar, which is decided accordingly.

Judgement of the County Court is reversed, and a new trial is granted.

WM. GAIGE & SAMUEL WALKER VS. HIRAM LADD.

A defendant of whom a recovery is had in an action of ejectment has a right to file his declaration for betterments by Statute.

A Court cannot refuse to permit such declaration to be filed, in consequence of what appeared on trial of the action of ejectment

Whether a party is entitled to recover for his betterments must be determined on trial of the declaration filed therefor, and cannot be decided by the Court who gave judgement in the action of ejectment, on motion.

In the County Court the plaintiffs against whom a recovery was had in an action of ejectment brought by defendant against them, moved to file their declaration for betterments on lot No. 26, in the 3d division of lands in the town of Bristol, drawn to the original right of Samuel Willis, in order to recover for betterments which they have made on said lot.

On the trial, Ladd introduced evidence tending to show that he and those under whom he held, had been in possession of the premises for about 25 years until the ouster by Gaige & Walker. It also appeared that Gaige & Walker went into possession in the Spring of 1831, claiming to hold the premises, not as lot No. 26, in the 3d division but as the Dean pitch in said Bristol. The jury found the premises in question to be lot No. 26, in the 3d division.

On hearing, the Court overruled said motion, to which the plaintiff's made exceptions. Exceptions were allowed, and the case now comes here for revision.

H. Needham, for plaintiffs, insisted that there is error in this case; for that the Statue laws of this State authorizes and gives the defendant in any case where judgement is rendered against him in ejectment a right to file his declaration for betterments. Rev. Stat. Law, 182; Pamphlet Laws, 1827, 4; Do. 1828, 5.

Bradley & Woodbridge, for defendant.

The defendant contends that the plaintiffs by the act of the General Assembly of this State, passed November 15, 1820, were not entitled to file a Bill for betterments in this case—by that act the defendant in ejectment can file his bill of betterments where he had gone into possession by purchase or lease, and had taken possession of the land previous to the passing of the act aforesaid. See Rev. Stat. p, 182.

This act was extended by act of the Legislature passed October 29, 1828. See Pamphlet, p. 5.

It appears by the exceptions in this case that the plaintiffs went into possession of the lands in question in the Spring of the year, A. D. 1831, and then not by or under a purchase lease or color of title, but claimed the premises as part of a lot called the Dean pitch in said Bristol.

For the reasons aforesaid, the defendant contends that plaintiffs had no right to file a bill of betterments, as they did not take possession of the land by or under a supposed title or lease of the same, and did not take possession at all till 1831, or make any improvements till after that period, and the acts aforesaid had expired by their own limitation, Oct. 29, 1828, so that the respective rights of each party stood as at common Law.

The opinion of the Court was delivered by

WILLIAMS, J.—Gaige & Walker against whom a recovery was had in an action of ejectment brought by Ladd against them, attempted to file a declaration for betterments agreeably to the provisions of the Statute. This was opposed by Ladd on the ground, that it appeared on the trial of the action of ejectment, that they did not take possession until after the passing of the act giving this pro-

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cess to recover for improvements made by a *bona fide* possessor of lands. The County Court refused to permit them to file their declaration. And an exception was taken to the decision of the County Court in refusing this permission. In this, the decision of the County Court was erroneous. The right to file a declaration for betterments is given by Statute, and does not depend on the facts which appear in evidence, or the proceedings had in the trial of the action of ejectment. It is given on the recovery of a judgement in that action, and it is not essential that there should be any trial of the merits of the action of ejectment. A defendant who is sued in an action of ejectment may abandon all defence and suffer a judgement to pass against him by default, or *nil dicit*, and if he is entitled to betterments may file his declaration and recover therefor.

It is on the trial to be had on this declaration that it must be determined whether the person seeking to recover for the improvements which he has made on lands of which he has been in possession, and entered under a supposed title within the time limited by the Statute, is entitled to the benefit therein provided. These questions cannot be decided by the Court on an objection to filing a declaration, but must be left to the decision of a jury who may be impannelled to try the action for betterments. If the Statute operates unfavourably, by causing a delay of the writ of possession, it is incident to the nature of the proceeding, and the Court cannot remedy the fault, if there is any.

The judgement of the County Court must be reversed and the declaration for betterments may be filed agreeably to the provisions of the Statute.

NATHAN GRISWOLD, JR. vs. AMOS W. BARNUM.

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That an administrator's indorsement of a negotiable note will enable the endorsee to maintain an action in his own name against the maker, where there is no insolvent representation of the estate, nor any matters of offset under our statute to embarrass such action.

That, where there is a representation of insolvency, or pleas in offset against the estate of the payee, all must be decided according as the rights existed on the day of the decease of the payee.

This action was commenced before the City Court of Vergennes, upon a note, executed by the defendant, and made payable to one James J. Winans or his order, in six months from the date; and bearing date April 12th, 1830. Winans has since deceased, and his widow, Ida Winans, has been duly appointed administratrix of his estate; and she, as such administratrix, assigned this note to the plaintiff. The declaration presents these facts as a ground of recovery. To this declaration, the defendant demurred; and the only objection, raised to it, was, that the administratrix had no power to assign the note, so as to enable the plaintiff to sustain an action it in his own name.

The City Court adjudged the declaration sufficient; and the defendant excepted to this decision; and the action is removed to this Court, under the provisions of the late statute.

Argument for the defendant.—The defendant in this case contends, that an administrator of an intestate estate has no power, by the laws of this State, to endorse over a promissory note made payable to the intestate or order, and, by such endorsement, give power to the endorsee to maintain an action in his own name against the payor of the note. This power cannot be derived from an act of the Legislature of this State. passed October 30, 1798, entitled, "An act allowing endorsees to maintain actions in their own names"—Stat. p. 144—neither by an act passed previous to that, in relation to the negotiability of notes, which was repealed by the act of 1798, as neither of these acts contemplate or mention any power relating to administrators. By the common law, no power was given to the endorsees of notes to maintain actions in their own names previous to

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the Statute of Anne; neither was the power given by the law merchant. The common law has been adopted in this State, so far as it is applicable to our local situation and circumstances, and is not repugnant to our constitution. We are not aware, that a statute of England constitutes a part of the common law adopted by this State, or that the law merchant has been adopted with us.—If so, why the necessity of making special provisions by our statutes in relation to the negotiability of notes? A full and elaborate exposition of the Statute of Anne, as also the Statute of our State, in relation to the transfer and negotiability of notes, is given in the 1st vol. Vt. Rep. p. 316, in the case of *Matthews* vs. *Hall*.

The defendant also contends, that an administrator has no right, by the Probate Law of this State, to assign a chose in action to a third person, and give the assignee power to maintain an action in his own name.—Stat. p. 332, and subsequent acts. As this power is not given by the act in relation to the negotiability of notes, neither by any special provision in the Probate Law, the question is now reduced into the single point, whether this power can be derived from the common law or the law merchant.—This point the defendant contends has been settled in this State, in the case *Jarvis* vs. *Barkers*, adm'rs, 3 Vt. Rep. p. 445, in which the Court say, the equitable interest of an intestate may be conveyed by an administrator; but the nominal pl'ff or defendant cannot be changed. From this case it would appear, that the administrator of the intestate might have power to assign over a note due the intestate; yet should an action be commenced against the payor by the assignee, it might be deemed tantamount to declaring on a new instrument. It will be seen in the case of *Woodbridge* vs. *Austin*,, 2 Tyler's Rep. p. 364, that, by the custom of merchants, a curator of an intestate estate has no power to endorse notes, and allow the endorsee to to maintain an action in his own name. And, if this power is given by the laws of Canada, it is incumbent on the plaintiff to show the right of the endorsor to make such transfer. The common law of England has not been adopted by the Province of Lower Canada; but the civil law constitutes the principal basis of their unwritten or com-

mon law. In the case of *Lee* vs. *Havens*, Bray. Rep. p. 93, it was decided, that an administrator in another state could not endorse a note against a citizen of this state, so as to convey any right to the endorsee. Kent's Commentaries, Vol. 3, p. 44, (notes) points out how far the statute of 3 and 4 of Anne has been adopted in different states.

Argument for the plaintiff.—The only point involved in this case is, whether an administrator can legally endorse a note payable to his intestate or order, so as to enable the endorsee to sustain an action upon it in his own name.

By the common law of England, previous to the statute 3 and 4 Anne, the negotiability of notes thus drawn, appears to have been a *doubtful* question; and, but for the hostility of Judge Holt, they would probably, without any statutory provision, have been placed upon the same ground in Westminster Hall, as inland bills of exchange; which, by the *lex mercatoria*, were thus negotiable.

The statute 3 and 4 Anne was produced rather by the pertinacity of Judge Holt's opinions, than by any serious doubt of what the common law was upon the subject.—The statute is referred to as recited in Chitty on Bills, p. 662.—Its preamble shows, that the question had been agitated as to the common law, and that it was passed for the very purpose of putting the rights of endorsees at rest.

Before the passage of any statute upon the subject in this State, and while the only subsisting rule was that to be found in the English common law, Chief Justice Chipman gave the people of this State, as his opinion, that "notes payable to order, are, on every just, legal, and equitable principle, assignable by endorsement; and that an endorsee might rightfully maintain an action in his own name upon the note:" and further, that, as this subject might then be considered, in this State, as *res integra*, we were not obliged to follow the reasons and policy of the English law; but were at liberty to make such decisions as should, in a general view, be agreeable to justice and the nature of the transaction. Reasons of a similar character were entertained and expressed by this Court in the case of *Matthews* vs. *Hall*, 1 Vt. Rep. p. 316; where, treating the subject before them as one not before agitated

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here, they recognize the justice, convenience, and understanding of the people generally upon the question, as reasons for the establishment of a rule of decision, which might be considered as part of the common law of Vermont.

The fact, that this question was doubtful in Eagland, created the Statute of Anne. In this State, before the passing of any statute, the principle seems to have been recognized upon its own equity, convenience, and justice.

The Statute of this State (Revised Statutes of 1824, p. 144) does not contain the name of an executor or administrator. Nor does the Statute of Anne. But, under the latter statute, it has always been holden in England, that they were both entitled to the benefits of it. And the only distinction made, as to them is, that by the endorsement, they bind themselves in their *individual capacities*, and not simply in their *official characters*.—*Rawlinson* vs. *Stone*, 3 Wilson's Rep. 1.—2 Strang. Rep. 1260.—Barnes' Notes, 164.—Kyd on Bills, 107.—Chitty on Bills, 159.

The case of *Lee* vs. *Havens*, (Bray. Rep. 93) where the endorsee of an administrator was not permitted to maintain his action, turns altogether upon the fact, that the administrators resided in another State, and that no administration had been taken out in this.

The plaintiff contends, First, That the equity of the case is against the defendant—no doubt existing as to the note being justly due.

Second, That, without referring to the English common law, or the statute 3 and 4 Anne, upon principles of convenience, equity, justice, and the general understanding of the people of this State, the judgement should pass in his favor.

Third, That the Statute of Vermont, (Revised Laws of 1824, p. 144) takes away no right which the plaintiff had before; and that, if he could have maintained an action previous to its passage, he can maintain one now.

Fourth, That, if the Statute 3 and 4 Anne has any application to this case, it is only so in reference to the rule of construction, which is applicable to our own. Both statutes are *remedial* ones, and are to be construed *liberally*.—Chitty on Bills, 420.

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HUTCHINSON, C. J. alluded to the foregoing facts of the case, and delivered the following opinion of the Court.— We must presume, that the administration upon the estate of Winans, deceased, was regularly granted in this State. The allegation in the declaration imports a regular administration, and, this is confessed by the demurrer. The only question before us, therefore, is, whether the indorsement by the administratrix, gives the plaintiff a right of action in his own name upon this note. We think the action well lies upon such an indorsement, when no impediments are presented, which arise from the provisions of our Statutes, for the settlement of estates. At common law, after the decease of the holder, the right of transfer is vested in the executor or administrator. But he thereby renders himself personally liable, should the bill or note be dishonored. See Chitty on Bills, 159, as cited by Counsel; 139 in the edition before me.

If the estate of Winans had been represented insolvent, and commissioners appointed under our Statute, the mutual claims on both sides must have been before them for adjustment, or be barred and lost; and these claims would necessarily all be considered and adjusted as they stood at the decease of Winans, and no transfer of the note could be sanctioned, which would defeat these mutual offsets before the commissioners.

No such impediment is presented in this case. There is no representation of insolvency as in the case cited of *Jarvis* vs *the administrator of E. Barber*. No offset is brought to view in the pleadings. Nothing but the action on the note in the name of the endorsee. We consider the declaration good and sufficient; and affirm the judgement of the County Court.

Woodbridge & Son. for defendant.
Tucker, for plaintiff.

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HENRY SOPER vs. JOHN R. SUMNER & WM. S. ABORN.

The owner of property who has by contract parted with the possession for a given time, cannot maintain an action of trespass against any one, who takes it from the person who is entitled to the possession while the contract is in force.

Nor can the owner maintain such action because he has a right to put an end to the contract and resume the possession before he does determine the contract.

Nor can he maintain such action, because the person who took the property from the possession of the bailee may have so conducted as to make himself as to the bailee a trespasser *ab initio*.

This was trespass for a pair of oxen and one yoke, tried by jury in the County Court.

The plaintiff introduced evidence tending to prove that on the 3d day of December 1830, and for some time previous thereto, he owned and possessed the property in question, as part of an estate on which he was administrator—and proved that on the day aforesaid, he hired out the same to one Robert Clark, by a written contract of that date which was read in evidence, and is as follows:

"Rec'd. Bristol Dec. 3d, 1830, of Henry Soper, one pair of Staggs, Yoke, and Cart, being the Staggs, Yoke and Cart, belonging to the estate of Oliver Drake, which Staggs, Yoke and Cart I promise to return to said Soper, on or before the 10th day of October next, the Staggs to be in good flesh, and the Cart and Yoke in good repair, and pay the said Soper five dollars for the use of said property, in good merchantable Coals, delivered at the Forge in Lincoln. (Signed) ROBERT CLARK."

The plaintiff also called witnesses whose testimony tended to prove that immediately after the execution of said contract and when Clark was starting to drive home said oxen under the agreement, the plaintiff told him he must keep them well and use them well. To which Clark replied that he would do so, and if the plaintiff should at any time become dissatsfied with his manner of keeping or using the oxen he should be at liberty to take them back.

It was admitted that in April 1831, the defendant Sumner, being a creditor of Clark, caused the oxen and yoke, then in possession of Clark, under the contract aforesaid to be attached and taken away at his suit by the other defendant, as the property of Clark, and that the attachment

was regularly followed up by judgement and sale of the property on execution; and there was evidence tending to prove that the defendants had notice of the above stated facts at the time of the attachment, and that he asserted his claim to one or both of the defendants shortly after the attachment. It further appeared in evidence that Clark used the oxen through the winter in drawing coal, in which business he had also used them several weeks previous to the contract aforesaid, that in the Spring of 1831 they were thin in flesh, but in condition to go through a light Springs' work. And there was no evidence that the plaintiff at the time of the attachment had became dissatisfied with the manner in which the oxen were kept or used, or that he ever signified his purpose to take them back before the expiration of said written agreement.

Upon this evidence the Court intimated their opinion that the plaintiff could not maintain trespass; whereupon he offered to prove that while the oxen remained in possession of one or both of the defendants under the attachment and before they were sold upon the execution, and before the commencement of this action, the defendants, or one of them had worked the oxen without the leave of the plaintiff or Clark; this evidence was objected to and excluded by the Court. The plaintiff having rested his case, a verdict was returned for defendants under the direction of the Court, and judgement rendered thereon. To which decision and direction of the Court the plaintiff excepted; exceptions allowed, and this Court is called upon to reconsider the case.

Needham & Woodbridge, for plaintiff.—In this case the plaintiff insists that the possession of the property in question by Robert Clark, under an agreement for use only, is the possession of the plaintiff for every other purpose except that use, and that any intermedling by the defendants or any other person with the property in question will enable the plaintiff to sustain trespass.

And that it is not necessary that the plaintiff have the actual possession of the property to sustain this action.—1 Term Rep. *Smith* vs. *Milles*, 480; 8 John. Rep. *Putnam* vs. *Wiley*, 432; 8 John. Rep. *Bradish* vs. *Schenck*, 151; 4

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Term. Rep. *Ward* vs. *McAuley*, 489; 11 John. Rep. *Thorp* vs. *Burling*, 285; 11 John. Rep. *Van Brunt* vs, *Schenck*, 377,; 7 Term Rep. *Gordon* vs. *Harper*, 9.

The defendant being a creditor of Clark and at the time of the attachment fully informed of the terms upon which Clark had the use of the property in question was not at liberty to count upon Clark's possession to realize his own debt from plaintiff's property.

The plaintiff having the right by the terms of the agreement to put an end to it at pleasure, of course had the right of immediate possession and may sustain trespass against any one who shall take away the property. 8 John. Rep. 432, as above.

The plaintiff, Soper, having demanded the property in question of the defendants before the commencement of this suit would be entitled to it agreeably to the terms of the original contract, between Soper and Clark. And as the defendants could acquire no greater right in the property than Clark had, he must deliver the same to the plaintiff whenever he wished to reclaim it.

The working of an estray or a beast destrained is trespass *ab initio* and the owner may declare for an unlawful taking. 10 Mass. Rep. *Gibbs* vs. *Chase*, 125.

Tucker & Bradley, for defendants.—The defendants contend that the action of trespass cannot be sustained, because by the plaintiff's own showing in the Court below he had leased the property in question, and that the term of said lease had not expired when the suit was brought; nor had the terms of the contract been broken so as to avoid the lease. The question raised is, whether the action of trespass can be sustained for the taking of personal property, when the plaintiff has neither the actual nor constructive possession of the chattle sued for, nor the right of immediate possession. If the general owner part with his possession, and the bailee at the time the injury is done have a right exclusively to the use of the property, the inference of possession is rebutted, and the right of possession being in reversion, the general owner cannot maintain *trespass* but *case* only, for an injury done by a stranger while the bailee's right exists. 1 Chittys Plead. 169; 1

Swifts Dig. 530; *Ward* vs. *McCawly et al*, 4 Term. R. 489; & in *Gordon* vs. *Harper*, 7 Term. Rep. 9, it was held that neither trover nor trespass would lie.

The opinion of the Court was delivered by

WILLIAMS, J.—It appears in this case that the plaintiff was the owner of the property, for the taking of which this suit is brought, that he had hired it to one Clark for a given time which had not expired when it was taken by the defendants, and that at the time of the grievance complained of, the same was in the actual custody and possession of Clark. On these facts it is very evident that the plaintiff cannot maintain this action of trespass.

To maintain the action of trespass it is necessary that the plaintiff should have the possession of the property at the time of the injury complained of. The action is given to recover for an injury to the possession and of course the possession must be either actually or constructivelyin the person who brings the action. The absolute owner of a chattel who is entitled to the possession is in contemplation of law, considered as actually possessed. Hence the owner who has *gratuitously* permitted another to use a chattel, has been allowed to recover in trespass for an injury done to it while it is so used. But where it has been leased for a certain time and has been delivered to the custody of a bailee; during that time, and while it is in the custody of the bailee, the owner cannot maintain trespass for any taking of the property from such custody. This is a familiar principle and will be found in the cases of *Ward* vs. *Macauley*, 4 Term. 489; *Hall* vs. *Pickard*, 3 Camp. R. N. P. 187; 2 Do. 464. This principal of law is fatal to the pl'ff's action unless his case can be considered as an exception to the general rule. In order to take it from the operation of this principle the pl'ff has insisted that the possession of the property by Clark under the agreement, was for every purpose, except the use, the possession of the plaintiff. To this it is answered, that if the use had been merely by the gratuitous permission of the plaintiff, he might have maintained this action, as being in the constructive possession; but where to enable a bailee to have the use he must have the actual custody, for a certain time, and pays

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a consideration therefor, then the possession is in the bailee, exclusive of the owner. In the present case, while the contract was in force, the plaintiff would have been guilty of a wrong to Clark, had he attempted to control, or use the property let to him.

The plaintiff also contends, that having a right to put an end to the contract at pleasure he had a right to the immediate possession, and therefore can maintain this action. It may be true that he had a right to put an end to the contract, and resume the possession, but until he exercised this right he could have no claim to the possession, or to any action for an injury to the possession. There was nothing in evidence or offered to be given in evidence by which it can be inferred that the contract between the plaintiff and Clark was terminated, or that the plaintiff had manifested any disposition to terminate the same at the time of the trespass complained of.

The assertion of the plaintiff's claim after the taking, or the knowledge of either or both of the defendants of the situation of the property can have no effect on this action, whatever it might have, on a different one.

The evidence offered and excluded, was clearly irrelevant. By the use of the oxen without consent, the defendants may have made themselves trespassers as to Clark.—But if the plaintiff can maintain this action at all, he had a right to institute the same when the property was first taken. As to him it needed no evidence of a subsequent abuse of legal process, or any after illegal act of the defendants, to give the plaintiff a right of action. But as he had parted with the control and custody of the oxen until the month of October, after they were taken, he cannot maintain this action, although the defendants may have made themselves trespassers as it regards Clark, by working the oxen without consent.

Whether the plaintiff after asserting his right can be considered as having put an end to the contract so as to enable him to maintain an action against any one who wrongfully withheld the property from him is not the question before us.

We are all of opinion that this action cannot be maintained. The judgement of the County Court is therefore affirmed.

JAMES MCDANIELS VS. AMOS W. BARNUM. (In Chancery.)

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Usury avoids a contract in equity as well as at law.

When a party in a court of equity attempts to enforce an usurious contract, the usury may be set up as a defence.

But when a party applies to the Court to be relieved from an usurious contract, equity will interfere, only on his paying the sum actually due.

When usury is relied on, to avoid a contract, it must be fully proved.

To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defence, is not to be taken as evidence for him, unless the plaintiff asks for a disclosure on that subject, but is only equivalent to a plea of the statute of usury

When a person has assigned a mortgage and notes payable to himself to raise money for another, and on a bill to foreclose, testifies that he was agent for the mortgagor, and that the contract on which the money was advanced was usurious, the Court will not decree that the notes and mortgage are void on his testimony alone, when it appears that he came before the master with a prepared deposition, a part of which had been written by the defendant requesting him so to testify, and when his testimony is at variance in some material parts with the testimony of another witness, although his general character is unimpeached.

This was a bill to foreclose the defendant's equity of redemption in certain premises in Vergennes and Waltham, mortgaged to secure the payment of the notes, described in the opinion of the Court.

The defendant, in his answer, admitted the execution of the notes and mortgage to one Joseph Rogers, and that they were assigned by said Rogers to the complainant, as set forth in the bill; and stated further, that said Rogers had no actual interest in the notes in question, but that said notes and mortgage were executed by the defendant, to enable the said Rogers, for the defendant, and as his agent, to raise a sum of money upon them for the defendant's use.

The defendant also, in his answer, set forth that for the said notes the said Rogers received only $3940; and that the remaining sum of $1060 was reserved by the said McDaniels, being four per cent. in addition to the legal interest on the note for $5000, till it fell due, and sixty dollars over; and that the smaller notes were given for, and amounted to the legal interest on the $5000 note, annually.

The complainant's bill contained no prayer that the defendant should disclose upon what consideration the said

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notes and mortgage were executed by said Barnum, or transferred by said Rogers. Rogers executed an assignment of said mortgage and notes to the complainant for the consideration (specified in the assignment) of ten thousand five hundred dollars.

It was admitted on the trial, that the complainant had paid, on the 10th day of January, 1832, $2404,62, to redeem the mortgaged premises from prior incumbrances; and also, that the complainant had obtained judgement, in a court of law, upon two of the interest notes.

The only evidence offered by the defendant, to prove the usury alleged in his answer, was the deposition of Joseph Rogers, who transferred the notes and mortgage to the complainant by assignment.

The counsel for the complainant moved to suppress this deposition—not for the improper manner in which it had been obtained and in part drawn up by the defendant, nor for any irregularity in the manner of taking it before the master, but on the ground that Rogers, standing in the relation he did to the transaction, *was an incompetent witness.*

Rogers swore to all the facts set forth in the defendant's answer, fully; and that he communicated to McDaniels that he did not want the money for himself, but that he wished to "hire or loan it" upon these securities "for Amos W. Barnum."

Certain interrogatories were put to Rogers, which, with his answers, were as follows:

1. *Question*, Is the paper you have offered here as the substance of your testimony (from which this deposition is drawn) a copy from any other paper?

Answer, I first made rough minutes of my testimony, and then drew it off correctly on this paper.

2. *Ques.* Is there not a good deal more on this paper than on the former one?

Ans. I think there may be a third more.

3. *Ques.* Did you ever show your first sketch to Gen. Barnum?

Ans. I think I did.

4. *Ques.* Have you ever had in your possession any thing written by Gen. Barnum, or any other person?

Ans. Gen. Barnum wrote down some sketches to know

if I would testify so and so,—stating what he wanted me to testify to. A part of my testimony now, is copied from what he wrote down.

5. *Ques.* What has become of that paper?

Ans. I cannot tell what has become of it. I think I destroyed it after I made out my testimony:—perhaps not: the last time I saw it, it was at my own house.

6. *Ques.* Do you think you can charge your memory with the precise phrases and terms you made use of in making the negotiation with McDaniels?

Ans. I have made use of the same expressions made at the time, as near as I can recollect. I may not always recollect the exact words in every case; but have stated the sense. I am not certain whether I made use of the words *get, hire or loan* money: I intend to be understood that I wanted to get, hire or loan the money for Amos W. Barnum.

7. *Ques.* Did you not propose to White, Button or others, in Danby, or elsewhere, to sell the securities you had for the money?

Ans. I do not recollect that I did.

8. *Ques.* Did you not state to Mr. Waller and myself, when we examined you at my office, that you did not recollect the particular phrases you made use of in getting the money?

Ans. I do not recollect any question put to me on that subject, except that Mr. Bates cautianed me not to make use of any technical language. I do not recollect how I answered the question, if such an one was asked.

9. *Ques.* Did you not at first decline to talk with us (when sent for by Mr. Waller) and state the reason to be that you did not know that it would be proper to talk with the opposite party?

Ans. Yes, I think it likely I stated some such thing, being a little wary—not knowing what the object might be.

10. *Ques.* Was it before or after this, that you received the writing from Barnum?

Ans. I cannot tell.

11. *Ques.* Did not Barnum, in the presence of Robinson, at Vergennes, remonstrate with you for declining to swear to a writing which he produced?

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Ans. I do not remember it.

12. *Ques.* Did you not advise McDaniels to pay the Field mortgage in order to redeem the property which was mortgaged to him?

Ans. I had a good deal of conversation with McDaniels on the subject, and advised him to act according to his own feelings; but did not advise him to redeem it. He advised with me a good deal on the subject, and I told him that was the best part of the land.

13. *Ques.* Do you know how much Mr. McDaniels paid to redeem those mortgages?

Ans. I think between twenty-three and twenty-four hundred dollars.

14. *Ques.* Did you carry the money, as the agent of McDaniels, and procure the mortgage redeemed?

Ans. I did.

15. *Ques.* Have you not recently put all your real and personal estate out of your hands?

Ans. I have deeded all my real estate to my son and daughter—my personal estate I have sold to my son, who is to pay the amount to another daughter.

16. *Ques.* Did not McDaniels pay the sum required to redeem said mortgage in consequenceof what Barnum told him.?

Ans. Not to my knowledge.

17. *Ques.* How many times did you hear Barnum and McDaniels talk about redeeming those mortgages, or did you hear them converse on that subject at all?

Ans. I heard them converse frequently about the mortgage, and about giving further security before the arrangement was made. I went to bed, and was not present when it was completed. Next morning McDaniels came to me, and said he had agreed to redeem the mortgages, and requested me to carry the money.

18. *Ques.* Did you not tell Mr. Waller and myself that you had told Barnum that it was wrong for him not to abide by the bargain he had made with McDaniels, after McDaniels had paid the money?

Ans. I do not recollect.

19. *Ques.* Did you not tell McDaniels you had a right

to sell the securities you had for what you pleased, and it would not be usurious?

Ans. I do no not recollect that I did.

20. *Ques.* Have you not presented the paper which you have offered as your evidence to some persons, and enquired of them if there was any thing in it which would implicate you?

Ans. I have shown that paper to several persons as my testimony, but not to enquire whether it would implicate me.

21. *Ques.* Did you not show it to Gen. Barnum?

Ans. I did several months ago. He wanted to know what I would testify to.

22. *Ques.* Is the paper hereto annexed, purporting to be signed by you, a paper which you executed on receiving the securities to get them recorded?

Ans. It is.

The following is the paper alluded to:

Danby, 25th November, A. D. 1828.

Received of James McDaniels a mortgage deed, given to me by Amos W. Barnum of Vergennes, in Addison County, Vermont, given me the 4th November, 1828, for two hundred and fifty acres of land in Vergennes and Waltham, and four lots of land in Vergennes, with all the buildings thereon; and also the notes described in said mortgage deed, for which the said James has paid me this day; and I have made an assignment to the said James of the property, and have acknowledged the transfer, and now take it to have it recorded in Vergennes and Waltham by the Town Clerks; and if the transfer is recorded, I promise to return it to the said James McDaniels, with the deed which is now recorded and sealed to the transfer, all safe; and I will pay them for recording, and McDaniels has paid me.

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23. *Ques.* Since the day when this examination was commenced, have you been able to find the paper which you stated Barnum handed you, and from which you stated that you copied a part of your testimony?

Ans. I have not.

24. *Ques.* Have you not entertained apprehensions that you might be liable for damages in consequence of this transaction?

Ans. I never have, unless my being agent for Barnum would make me liable.

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25. *Ques.* Have you not asked different persons whether you would not be liable?

Ans. I have asked several persons their advice whether I could be made liable as agent.

26. *Ques.* Did not this consideration influence you in putting your property out of your hands?

Ans. It did not.

27. *Ques.* At the time you put your property out of your hands, did you suppose your memory or capacity for doing business was impaired?

Ans. I am not aware but that I was as capable as ever I was.

28. *Ques.* When Mr. Waller and myself sent for you to come down here to converse on this subject, did you not call on Gen. Barnum before you came, and converse with him on this subject?

Ans. I did call on him: Nothing was said in Mr. Waller's letter to me on what subject he wanted to see me.—I called on Barnum, and told him I had such a letter, and enquired of him whether he thought it was on this business, and whether Waller was McDaniels' attorney.

29. *Ques. by counsel for def't.* How far were you guided in making out the statement of your own testimony by the paper which you say Barnum handed you?

Ans. It had no effect on my testimony.

30. *Ques* What induced you to ask any persons, as you have stated, their advice whether you would be liable, as you have stated.

Ans. Several people enquired of me whether I had not been lurch'd by Barnum, or was liable to lose by this transaction.

31. *Ques.* Has not McDaniels been unceasing in his efforts to prevent your testifying in this case?

Ans. He has a number of times said that I had better not testify.

32. *Ques. by counsel for complainant.* Did you not ask McDaniels what he would give you if you would not testify?

Ans. I asked McDaniels whether, in case the Court should compel me to testify, he would indemnify me if I

refnsed. This is all the questions I asked him on that subject.—McDaniels made no answer to my inquiry.

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Thomas McDaniels, the son of the complainant, made the following deposition:

"At the time when Joseph Rogers and my father, James McDaniels, made a negotiation, in which said Rogers transfered to said James McDaniels a mortgage from Amos W. Barnum, in the fall of the year 1828, Joseph Rogers came to the store of my father, where I was employed in waiting on customers; and the said Rogers stated to the said McDaniels, that he wished to sell some notes against A. W. Barnum, secured by a mortgage. He showed the notes and mortgage, and said he wanted, or had got to raise some money. The notes and mortgage were examined by my father and by myself. My father told him, he did not know that he should want to buy them: my father told him that if he would get Willard Staples, John Vail, and Aaron Rogers, or either two of them, to sign a note with him, he, my father, would try to raise the money for him; that he had rather have their notes, than the notes and mortgage against A. W. Barnum. Rogers said, he did not know that he could get them to sign, and proposed that he should buy the notes and mortgage. My father declined buying them at that time, and Rogers went off. Afterwards Rogers came again, and a similar conversation took place: my father still declining to purchase the notes and mortgage: and Rogers said he would sell them at a discount. My father said he did not know that he wished to buy them; that he he did not know but it might be called usury. Rogers said it could not; and said he had a right to sell the notes at a discount, and it would not be considered usury. Rogers was there several times, and had conversation on the subject. I was occupied a part of the time, and did not hear the whole conversation; and cannot say that I was present when the negociation was closed. I was in the store when the money was paid, and my father and Rogers went out of the store or room where I was, so that I was not present when the money was paid to him by my father; but I think I witnessed the assignment, and Rogers came into the store after he had received the money, and asked for a paper to wrap it up in.

Question by the defendant's counsel.—Do you know how much money your father paid Rogers at that time, or did your father ever tell you how much?

Answer.—My father never told me how much, and I never asked him.

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Quer. Who did you understand the money was for?

Ans I did not understand it was for any person but Rogers himself."

C. C. Waller's deposition, in relation to the conversation between himself, Rogers, and Mr. Bates, as far as the facts stated by him have any bearing in the case, is as follows:

"After the commencement of the present suit, I wrote to Rogers, requesting him to come to Middlebury the next day after I wrote him. He came accordingly, and at R. B. Bates' office, in presence of Mr. Bates, I requested him to state all the facts in relation to the transfer of Barnum's mortgage to McDaniels. He seemed very unwilling to make any statement of the facts, and questioned us upon several differnt statements, as to their effect in the suit, provided they were so and so. After this, he stated that he acted in the transfer merely as Barnum's agent, and that he received for the transfer the sum of $3940, as this deponent believes. Upon the question being asked Mr. Rogers, why Barnum did not close with McDaniels, as had been agreed, before the payment of the redemption money, Mr. Rogers replied, that Barnum did wrong in that, and had rather overreached McDaniels, or words to that effect."

Argument for complainant.—In such a case the defendant's answer is not to be taken as evidence. 1 John. Rep. *Green* vs. *Hart*, 580; 2 John Chan. Rep. *Hart* vs. *Ten Eyck*, 62.

Four questions arise in this case.

First.—Supposing the transaction, as related by Rogers alone, to be usurious, will the plaintiff be decreed to recover the sum advanced and legal interest, or must he lose the whole?

Second.—Can Rogers be a witness?

Third.—Is his deposition, under all the circumstances, sufficient proof of the usury?

Fourth.—Does not the whole evidence, taken together, rather prove a sale than a usurious loan?

First.—A Court of equity is the offspring of necessity. The undeviating rules of law were thought sometimes too oppressive; the moral feelings of men required an institution to mitigate their rigor; and the great principle of this Court has always been to do what is right between par-

ties without punishing them for the weakness and errors of humanity.

There are many subjects over which Courts of equity will not exercise a jurisdicction. There are others upon which their course of action is settled by precedent and many general rules are laid down in cases not calling for their application. But we have never yet seen a decree in any given case which would shock the moral feelings of men. In short, there is nothing which these Courts have not done, nor any thing which they have refused to do to avoid such a result.

In the present case there was no meeting of the rich and poor, no negotiation for a loan. Barnum conceived a project and caused it to be executed. He gave his notes and his mortgage deed to Rogers and sent him forth into the world, to New York and elsewhere, to seek a purchaser or person to advance the money, and now seeks to consummate the transaction by throwing an entire loss upon that person.

The mind of every man must revolt at such a result, and it may be asked, will a Court of equity allow the Statute of usury to be used in such a way?

There are many cases where these Courts have not allowed a party to make a fraudulent use of a good Statute.

As when a man has taken a deed, absolute on the face of it, but, in reality, a mortgage, parol evidence is let in contrary to the Statute to prove the condition.

So where a man knowing of an unrecorded deed, takes a subsequent conveyance of the same land, the first deed holds in opposition to the Statute.

So also, upon the purchase of land by parol; where possession has been taken, the parol contract is allowed to be enforced, contrary to the provisions of the Statute.

To decree that the whole should be lost is in effect to pronounce a forfeiture, which is repugnant to the origin of these Courts and all the principles by which they profess to be governed. 4. John. Chancery, 431, *Livingston* vs. *Tompkins*.

It is an admitted rule that he who asks equity must do equity. This principle is generally applied against the

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person instituting the suit, but every reason on which the principle is founded applies to this case.

The plaintiff has the notes and mortgage all regularly executed by the defendant, who comes into Court and asks to falsify and disprove his own acts and insists upon, not mere justice and equity, but upon paying nothing at all.

Secondly.—These papers show upon the face of them that Barnum gave Rogers certain promissory notes for value received, and a mortgage deed to secure the payment and that Rogers sold and assigned them to McDaniels. In all this there would be no usury. But Rogers is called as a witness to alter the character of these papers, although by his own hand writing on the mortgage deed, he has assigned them and given them currency. Having put his name on the deed is he competent to impeach it? The case of *Chandler* vs. *Mason*, 2 Vt. Rep. 193, is against it, and there is an obvious impropriety in allowing a man to-day to sign a contract executed to himself, and to-morrow to swear that the contract was a fiction and himself a man of straw.

In comparing the conflicting decisions on this point in *Walton* vs. *Shelly*, 1 Term. Rep. 296, & *Jourdon* vs. *Lashbrook*, 7. Term Rep. 601, it is worthy of remark that the first case was decided by the unanimous opinion of Lord Mansfield, Ashurst, Buller and Willes. The second only by Lord Kenyon, Lawrence and Gross. Ashurst dissenting. And that the last decision turned upon the apprehension that the national revenue might suffer from the principle established in the former. Whereas, as was well observed, by the judge in *Chandler* vs. *Mason*, the decision in the case of *Walton* vs. *Shelly*, rests on the broad basis of fair deal amongst men.

Third.—The testimony of one witness, and that merely upon *affirmation*, is not sufficient to justify so large a forfeiture. In criminal cases affirmations are not admitted at all. Whether he paid to Barnum all the money he received is a fact in which he is deeply interested and which depends on his testimony alone—this deposition on the face of it is suspicious—McDaniel's depositioncontradicts him on the most material points. The tenor of the receipt he gave to McDaniels is repugnant to his present statement. He admits that a part of his deposition was

copied from a writing furnished him by Barnum—and it is evident his mind since the commencement of the difficulty has dwelt upon the supposition that if he was an agent merely he should escape any liability.

Fourth.—Is the transaction to be regarded as a loan or as a *purchase* of paper sent to the nearest market for sale. The Statute of usury can never be violated by a *bona fide* allowance for risque. Its object is to prevent the reception of more than six per cent when there is no actual hazard.

In this case Rogers refused to indorse the notes, and there was a hazard which McDaniels could not but fear. He has since been obliged to advance several thousand dollars to disincumber the security.

In 2d Con. Rep. *Loyd* vs. *Keach*, Judge Gould says "if the seller does not warrant or indorse the note thus transferred, the presumption is that it is a sale, and not a usurious loan." Yet in that case the maker promised to pay the whole note as well as in this. And indeed, that is a strong case in our favor, to show that this transaction may be regarded as a sale.

To constitute usury there must be a loan and a corrupt agreement for more than legal interest. Negotiable paper may be sold in the market like other property. In this case the sale was not a mere cover for another transaction. It was real and constituted the whole transaction.

That McDaniels regarded it as a sale, is obvious from the terms of the agreement, as well as the receipt which was given by Rogers at the time, and also, from his son's deposition.

Argument for defendant.—Rogers has no interest in the event of this suit, and this is the only true ground of objection to his admissibility ever recognized in this state. 2 Aik. 138, *Nichols* vs. *Holgate*.

The doctrine in the case of *Walton* vs. *Shelly*, has been fully overruled in England, and is not considered law there. 2 Starkie, Ev. 300, 398-9.

That doctrine never was adopted there, except in relation to negotiable paper and as among parties to such paper which was passed on the responsibility of the names

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thereon, and this was done on principles of policy peculiar to that country.

1st, This does not apply to the case, as the paper was not negotiated by the witness, nor his liability taken or relied on.

2d, The circumstances of our country call for the adoption of no such legal policy by judicial legislation.

Rogers can *be in no event* liable to either party, and therefore none of those results can transpire which have been regretted in the *Nichols* and *Holgate* case.

The plaintiff has come into Court for a decree to enforce his mortgage, and must fail if the same be illegal and void by being usurious.

Wherever the notes cannot be enforced at law, or ejectment sustained on the mortgage, then a foreclosure cannot be enforced; though on a bill to redeem, by the mortgagor, the Court would require him to do equity by the payment of the true debt.

If the testimony of Rogers is established, the notes and mortgage are usurious and void; and this testimony is not contradicted by, or inconsistent with the testimony of Thomas McDaniels.

The usury appears by the answer, and is not disproved by the plaintiff.

WILLIAMS, *Chancellor*, delivered the opinion of the Court.

This is a bill brought by the complainant, to foreclose the equity of redemption in certain mortgaged premises. The bill charges, that the defendant, on the 4th November, 1828, executed the mortgage in question, to one Joseph Rogers, to secure the payment of certain notes executed by the defendant to Rogers, of that date, one for five thousand dollars, payable in five years from the first of May, 1829, one for four hundred and fifty dollars, payable on the first of May, 1830, and four of three hundred dollars each, payable on the first day of May, in the years 1831, '2, '3 and '4, at the bank of Vergennes. And that Rogers, for a valuable consideration, sold and assigned the notes to the complainant. The bill further charges, that the premises mortgaged were subject to the incumbrance of two prior mortgages—one to Moses Catlin, which had been

assigned to George Field, on which a decree of foreclosure had been obtained—the other given directly to the said Field, on which a decree of foreclosure had likewise been obtained;—that the complainant had been compelled to pay the amount of the mortgages last mentioned, amounting to $2404 62.

The defendant, by his answer, admits the giving the notes and mortgage to Rogers, but says, he employed Rogers as his agent to obtain money for him; that he executed the the notes and mortgage to enable Rogers to obtain the money and to assign the same as security therefor; that Rogers assigned the notes and mortgage to the complainant for money advanced by the complainant to Rogers; that the complainant knew that Rogers, in negotiating for said loan of money, and assigning the securities, acted as the agent of the defendant; that the contract between Rogers and the complainant was usurious and void—the complainant having reserved out of the loan one thousand and sixty dollars, and paid to Rogers three thousand nine hundred and forty dollars, and no more.

To prove this defence, the defendant relies on the testimony of Joseph Rogers, who says very explicitly, that he was employed by the defendant to raise the money; that the notes and mortgage were executed to him by Barnum to enable him to obtain money thereon; that he acted solely as the agent of the defendant; that he so declared to the complainant when he first made application to him; that in all his conversations with the complainant, he avowed himself as the agent of the defendant; that he had no interest at all in the money obtained, and that the sum stated in the answer was all he received of the complainant. Indeed he testifies directly to the fact of usury.

There appears to have been a great irregularity in taking the testimony in this case, and a palpable violation of the rules which govern proceedings in this Court. No interrogatories were settled; but the witness came before the master with a prepared deposition, and the counsel for the parties examined and re-examined him, as they would a witness who testified, *viva voce*, in Court.

The defendant does not object to the plaintiff's taking a decree for the amonnt he paid to redeem the mortgage of Field; but the mortgage executed to Rogers and assigned

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to the complainant, he insists is void as being an usurious transaction.

The statute declares that all contracts and assurances whatever, on which more than lawful interest is reserved, taken or secured, or agreed to be reserved or taken, shall be utterly void. There can be no doubt, therefore, that where full and sufficient proof can be made of the fact, that usury avoids a contract in equity as well as at law. In the exposition of this statute, as of all others, courts of equity adopt the same rules as courts of law; yet, it has been said by an eminent Chancellor, "it does often vary in the remedies given, and in the manner of applying them." Equity never relieves against an usurious security, on the application of the person who executed it, except upon the terms of his paying what is really *bona fide* due thereon, with legal interest.—*Scott* vs. *Nesbit*, 2 Br. C. C. 641.—9 Ves. 84.—16 Ves. 124. The rules of the Court in relation to practice, are never dispensed with, to enable a defendant to defend on the ground of usury, except on his consenting to a decree for the amount actually received with the interest. It has been said, with great propriety, by a writer on this subject, in a treatise on equity, that the Court, "in many cases have a discretion, whether it will interfere or not, and may therefore prescribe the terms of its interference; yet it will never exercise this discretion in favor of a plaintiff who is a wrong-doer, seeking to render a court of equity the means of effectuating the wrong."—Fonblanque, 1 Vol. p. 22. The sum of money advanced, together with the legal interest, ought in justice to be repaid by the borrower, although the contract or security may be declared void by a statute founded wholly on principles of public policy. If there is any moral guilt in making an usurious contract, both parties are equally guilty, though it may be extenuated on either side by the particular circumstances attending the transaction. The remedy afforded by the statute must be given, upon principles applicable to all similar cases without regard to the character of the parties, the exorbitancy of the sum agreed to be given as interest, or the circumstances which may appear either in extenuation or aggravation. Any sum knowingly and designedly reserved in a contract above the legal inte-

rest, though ever so small, if in violation of the provisions of the statute, renders the contract void; and it is no more than void if the sum is ever so large.

When usury is set up as a defence in a court of equity, and the object of a party is to avoid a contract entirely, and appropriate to his own use the money of another, and avoid the payment by force of the statute, it must be fully and substantially proved; and the evidence to prove it, is not aided by the answer of a defendant unless he is particularly called on, to disclose in the bill. The gratuitous answer of the defendant in this case, does not make his declarations evidence; but is to be regarded as only equivalent to a plea of the statute of usury. This evidence should come from legal, competent and credible witnesses, or at least from the testimony of one unimpeached witness, who testifies under such circumstances that full credit is to be given to his testimony. It is not sufficient barely to raise a conjecture, or a probability merely that the facts may be as contended for. A witness may swear to a fact, whose general character is unimpeached, and yet the nature of his testimony may be such, or the other circumstances detailed in evidence may be such, as to lead to a doubt whether his testimony is entitled to credit, and makes it improper to proceed on his evidence alone.

Courts of justice have felt themselves compelled to receive testimony even from witnesses whose general character was unimpeached, upon which they could not recommend to a jury to find a verdict. It was declared by the Court in Virginia, that the testimony of a witness, tending to fix a fraud upon himself, ought not to be regarded, *Claiborne* vs. *Parish*, 2 Wash. Rep. 148. In relation to witnesses who have attested wills, and were afterwards called on to impeach their execution, Lord Mansfield often said, he would hear those witnesses, but would give no credit to them; and in this he was followed by Lord Kenyon. It will be readily acknowledged by every one, that the testimony of a witness who comes to cut down and destroy a security for money which he has either passed himself or aided others in passing, should be received with jealousy, and examined with great caution.

The witness, upon whose testimony alone the defendant

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relies, is Joseph Rogers, the man to whom the defendant executed the notes and mortgage in question, and who assigned the same to the plaintiff. No other witness has been examined by the defendant. The complainant contends, that upon this testimony alone, taken under the circumstances disclosed in the deposition, compared with the testimony of the other witnesses, taking into consideration the part which he has acted in this business, and the nature of the facts to which he testifies, the Court would not be warranted in declaring this mortgage and these notes void.

In the first place, he appears, according to his own relation, as the friend and agent of the defendant, who received these notes and mortgage for the purpose of obtaining money for him; and there can be no doubt, that it was originally contemplated that he should raise the money at more than six per cent. interest. The giving the first interest note for four hundred and fifty dollars, shows most conclusively, that this was understood by both of them.—Now, if it can be supposed, as was urged in the argument, that it was originally designed and contrived between the defendant and witness, that the money should be obtained by stipulating to give more than legal interest, and this inducement was to be held out by the witness to his friends, to whom he was about to apply for the loan of the money, and at the same time, they intended to avoid the payment by force of the statute, it would very much detract from the character of the witness as a man of integrity, if it did not affect his credibility. The evidence, though it may lead to suspicions that such was the intention, may not warrant the inference directly that such was the fact.

If the witness in this transaction acted merely as the agent of the defendant, there was no necessity for any backwardness or reluctance in declaring all the circumsances, with which he was acquainted; and towards the plaintiff at least, from whom he obtained the money, and who was to lose entirely, the sum of about four thousand dollars, he should have shown the utmost frankness. It appears by his testimony, that, although he very readily drew off and and showed to the defendant, minutes of what he would testify to, and when he was written to by Mr. Waller, one

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of the counsel for the complainants, requesting an interview, he first called on the defendant to enquire whether Mr. Waller was the attorney for the plaintiff, and whether he thought he wanted to see him on this business, yet there was not the same readiness to communnicate to the complainant or his counsel. On being interrogated whether he did not decline to talk with the counsel of the complainant, and state as a reason therefor that he thought it improper to talk with the *opposite party*, he answers, "I think it likely I stated some such thing, being a little *wary*, not knowing what the object might be." Surely, there was no need of this wariness towards the complainant, who applied to the witness to assist him in making the settlement in relation to the lands mortgaged to Field, and employed him as agent for the complainant, delivered him the money to redeem the mortgage to Field, more especially as the witness says, "that he supposed the whole business was then settled—that the defendant did wrong in not closing with the complainant as he agreed, before the payment of the money," and had, as the witness says, "in that rather overreached" the complainant. These circumstances certainly throw a shade on the fairness, if not the integrity, of the witness.

Again, there is an evident contradiction between the testimony of this witness, and the testimony of Thomas McDaniels, the son of the plaintiff. Rogers represents that he first presented himself to the complainant as the agent of the defendant, and to hire money for him; and repeats it several times: he says, that in all his conversations and negotiations with the plaintiff, he declared that he had no interest in the business—that he was agent for the defendant—that he did not know that defendant would ratify the bargain, or "bear him out," as the witness expressed it—that he intended to be understood that he wanted to get, hire, or loan the money for Amos W. Barnum. Thomas McDaniels testifies that he was present at the time Rogers applied to his father for the money—that Rogers then said he wanted to *sell* the notes and mortgage—that he had got to raise some money; and when the plaintiff declined to buy the notes, and proposed to have Rogers procure certain persons named to sign a note with him, as

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he should prefer to advance the money on their notes rather than on the note against Barnum—that Rogers then replied, that he did not know as he could procure those persons to sign a note, and preferred to have the plaintif *buy* the notes and mortgage. He further testifies, that at a subsequent time, Rogers again applied to the plaintiff to *buy* the notes, and offered to sell them at a discount, declaring that it would not be considered as usury. This witness further says, that he examined the notes and mortgage with his father, and he did not understand that the money was wanted for any other person but for Rogers himself.—This testimony is utterly inconsistent with the statement of Rogers, that he so repeatedly represented himself as the agent of the defendant, and in that character alone, wanted to obtain for him a loan of money from the plaintiff.—The representations of both of these witnesses on this subject, cannot be correct, nor can they be reconciled on the principle of positive and negative testimony. In corroboration of the testimony of Thomas McDaniels, is the receipt executed by Rogers on the 25th November, 1828, in which he acknowledges the receipt of "the note which the said James has paid me for this day"—thus recognizing a sale, as stated by Thomas McDaniels.

There is another circumstance, which appears from the testimony of Rogers, which casts such an imputation on it, as should induce us to pause at least before we pronounce a decree on his testimony alone. The witness came before the master as I have already said, with a prepared deposition. On being interrogated whether the paper then produced, as the substance of his testimony, was copied from any other paper, he answered, that he made rough minutes of his testimony, and then drew it off correctly on the paper produced. To another question he answers, that the paper produced, contains a third more than the former one. His first sketch, he says, he showed to the defendant. He is then inquired of, whether he ever had in his possession any thing written by the defendant or any other person; to which he answers in the following words: "General Barnum wrote dewn some sketches to know if I would testify so and so—stating what he wanted me to testify to: a part of my testimony now is copied from

what he wrote down." This paper, the witness says, he thinks he destroyed after he made out his testimony.—The last time he saw it, was at his own home. The paper which the witness produced as the substance of his deposition, and which must of course have been copied from the paper given him by defendant, he says, in answer to the 21st interrogatory, he showed to the defendant some months before, when he wanted to know what he (Rogers) would testify to. He further says that he has not been able to find the paper handed to him by defendant, and from which part of his testimony is copied, which strengthens the inference which the witness has drawn, that it was destroyed. What part of this statement or sketch, written by the defendant, is copied into his deposition, the witness does not specify: perhaps he does not recollect. It may have been the most material part of his testimony. He furnishes no means by which we can separate it from the other. And though the witness says, and probably thinks, that he was not guided in making out the statement of his testimony, by the paper handed him by the defendant, and that it had no effect on his testimony; yet it may have had an influence which he cannot recognize. We know the danger to be apprehended from testimony created by a party in this way. By stating facts to a witness—by giving him a written statement which is afterwards destroyed, it has been the case, that a witness has thought he recollected facts which had no existence. Indeed, it would always be difficult for a witness to distinguish between facts of which he had a distinct knowledge at the time of the transaction, and those which he acquired from the statement or writing obtained from the party who made them. Without imputing any such intention to create testimony in this case, it is apparent that this circumstance throws a very great discredit on the deposition of this witness.—There can be no doubt that this deposition would have been suppressed for this cause, if a motion had been made therefor. At law, a deposition drawn up by an agent, attorney, or party interested, is to be rejected altogether.—In chancery, a deposition was suppressed because the attorney for the plaintiff had written it down in the exact

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form in which it was taken, though it appeared that the witness had told him the facts and circumstances mentioned in it.—Ambler, 252. If a deposition of this character is to be rejected entirely as improper to be read, and because it is of dangerous tendency to admit a party to impose his own statements as evidence, it is surely improper to claim for such a deposition the credit due to the statement of a witness who testifies in the ordinary manner, without any prompting or direction by the person in interest. It is further to be remarked in this case, that the notes and mortgage were executed by the defendant to the witness, Rogers; and that Rogers has, by his deed under his hand and seal, transferred and assigned the mortgage, together with the notes, to the complainant. His testimony is now introduced to avoid them: and although the Court did not consider this as coming within the rule in the case of *Walton vs. Shelly*, or if it did, were not inclined, on that ground, to reject the testimony altogether, yet we do say, that although we should not be disposed to go to the extent which Lord Mansfield and Lord Kenyon are said to have expressed their determination to do, in the case of witnesses who impeach the execution of a will attested by them, yet we can with propriety adopt the language of Lord Eldon, and say that such "testimony is to be received with all the "jealousy, necessarily for the safety of mankind, attaching "to a man, who, upon his oath, asserts that to be false, "which he has, by his solemn act, attested to be true."—*Howard vs. Braithwaite*, 1 Ves. & Bea. 202.

From a view of the whole case, considering the situation of the witness, Rogers—the part which he states he took in this transaction—his connexion with the defendant—his wariness, and want of frankness towards the complainant—the irreconcilable difference between his testimony and that of Thomas McDaniels—the manner in which his deposition was prepared—his copying a part, which may have been all that was material, from a paper given him by the defendant—his not being able to state what has become of that paper, and not distinguishing what was copied from that paper, from the other part of his testimony;—considering, also, that he comes to avoid by his testimony, a se-

curity which he has passed as a valid security, and which he *first offered* to sell to the plaintiff, we consider that we should be unjust to the parties, and unfaithful to ourselves as Chancellors, to pronounce a decree vacating this mortgage and these notes, and thus enable the defendant to take this sum of money from the complainant without any remuneration therefor, on the solitary deposition of this witness, unsupported by any other. And if we are to be guided by legal testimony, and not indulge in conjecture—if we are to derive our information from a source unpolluted and wholly deserving of credit, we cannot say that the facts set forth in this answer, are proved by competent and credible testimony.

The result is, that the complainant is entitled to a decree; and it must be referred to a master to ascertain the sum due to him on his mortgage.

Bates, *Waller* and *Royce*, for complainant.

Phelps, *Bell*, *Collamer* and *Linsley*, for defendant.

JOHN HOUGH VS. HARVEY H. LAWRENCE.

The length of notice to the adverse party of the taking of a deposition, not being fixed by statute, it becomes a matter of discretion with the Court in which the deposition is to be used, to judge of the reasonableness of such notice.

Where any question has been made in a County Court, not resting upon, or to be decided according to the known principles or usages of law, but by the Court's exercising a sound *discretion*, this Court never takes upon itself to revise such decision.

It is the province of the magistrate, taking a deposition, to judge of the capability of the witness to narrate facts.

The testimony of a magistrate taking a deposition, offered to show an apparent want of intelligence in the deponent, is inadmissible.

This was a case tried in the County Court, June Term, 1830.

On the trial, the defendant offered the deposition of one William Emerson, which contained evidence material to the issue. It appeared that said deposition was taken on the second day of the term of said Court, and that the plaintiff was duly notified to attend at the taking thereof, and did attend, but without the assistance of counsel; and

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that the cause assigned in the caption of said deposition for the taking thereof, was, that the deponent was going out of the state, not to return before the time of trial.

To the admission of said deposition, the plaintiff's counsel objected; but the objection was overruled by the Court, and the deposition was read in evidence to the jury.

The plaintiff also offered the evidence of the magistrate who took said deposition, to show apparent want of intelligence of the deponent, which evidence was rejected by the Court. The age of the deponent appeared to have been fourteen years.

To which admission of said deposition and rejection of evidence, the plaintiff excepted, and the case passed to this Court for further adjudication.

Argument for the plaintiff.—Two questions are raised in this case:

1. Is a deposition admissible, taken within the term at which the cause is to be tried, when the adverse party does not attend at the taking, with the assistance of counsel? And,

2. Is it competent for the party, against whom the deposition is used, to prove apparent want of intelligence of deponent?

I. Is the deposition admissible?

Depositions are to be regarded as secondary testimony, and are not to be favored. It necessarily follows that the law admitting them should receive a strict construction.—And such has always been the construction in regard to the formalities of taking and certifying.—See example in Chipman's Reports, page 179.

If such exactness is required with regard to matters of form, much more should it be in regard to matters of substance.

The diminished value of testimony by deposition, compared with that in open court, furnishes a strong reason for indulging the party against whom the testimony is to be used, with the aid of counsel.

This privilege is peculiarly important in the examination of witnesses, especially in their *cross-examination*—particularly when that cross-examination is out of Court.

The argument thus far assumes that the plaintiff in this case was necessarily deprived of the aid of counsel. This must always be the presumption in cases of depositions taken in term time.

It is not necessary, in order to give force to this presumption, to suppose that the counsel of the party is at the moment of taking the deposition, engaged in a cause on trial. His liability to be thus engaged at any moment, renders his constant presence in court necessary.

But want of counsel is not the only objection in this case. The Statute, p. 81, sec. 81, requires that the deponent should be "going out of the State, not to return before the time of trial." Can the certificate of this by the magistrate on the second day of the term, be legally *true*?

What is the "time of trial?" We answer, the whole of the term. The law knows no distinction of days in a term. There is no such distinction ordinarily in practice. Causes are not assigned to particular days.

Witnesses are accordingly subpœnied to attend at *the term;* and they are presumed to be in Court from the commencement of the term.

We contend further, that the witness should have stated in his deposition, that he was going out of the State before the time of trial.

No time, in this case, is given to the adverse party to disprove the necessity of the witness's absence. This is the more necessary inasmuch as it is the more difficult to disprove this than the fact of sickness, age, infirmity, &c.

II. May apparent want of intelligence of the deponent be proved?

The degree of reliance to be placed upon testimony may be as much affected by *want of intelligence as want of honesty.*

The witness in this case was a lad of the age of fourteen, and was the servant of the defendant at the time of the transaction with regard to which he testifies.

The enquiry after his apparent want of intelligence becomes more important by reason of the want of opportunity to cross-examine by counsel.

But admitting the importance of the enquiry, the question arises, is it competent for the party to make it?

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It is proper to prove that a witness *on the stand* is in a state of mental alienation, or that he is destitute of common understanding. This testimony must of course be proper with regard to a deponent.

And may not this be proved by his appearance? How else indeed can it be proved? If the witness is on the stand, this sort of proof is brought home to the senses of the jury. This of course is the *best* proof. But if a party will use a deposition, especially in a case of doubtful necessity like the present, may not the adverse party get the proof to the jury by secondary testimony. It is, in such case, the best evidence. And shall he, in addition to the ordinary disadvantages of having the deposition rather than the witness in Court, be deprived of such evidence altogether?

We think, therefore, that the deposition ought not to have been admitted to the jury. But if read, that it should have been accompanied by evidence of the deponent's apparent want of intelligence.

Argument for defendant.—1. The deposition could not be objected to on the ground of its being taken in term time.

The plaintiff attended and cross-examined the witness without objection to time. Had he objected, the defendant might possibly have detained the witness till the trial.

2. The age of the deponent appeared, and the deposition which may be referred to, shows the nature of the facts stated. Had the magistrate been permitted to give his opinion of the intelligence of the witness, others might have been called to the same point on the other side, and as there is no criterion by which to graduate an *appearance* of intelligence, it would have led to a very long and fruitless examination. The magistrate took down the facts he deposed to, and administered the oath. The offer was not to show the witness incompetent to understand and relate the facts stated in the deposition, but to show his "apparent want of intelligence."—This was too loose.

If the deposition, not being made a part of the case, cannot be referred to, it is sufficient for the defendant to say, that it does not appear that the facts contained in the dep-

osition were material, without which the Court would not grant a new trial.—2 Vt. Rep. *Sargeant* vs. *Leland*, 277.

The opinion of the Court was pronounced by

Paddock, J.—Where a deposition is to be taken, afterwards to be used in a Court of law as evidence, our statute requires "*that the adverse party shall have a reasonable time to appear and be present at the taking of the same;*" so that the length of notice to be given, before the taking the deposition not being fixed by statute, it becomes entirely a matter of discretion with the Court in which the deposition is to be used, to judge of the reasonableness of the notice, and either admit or reject it; and where any question has been made in a County Court, not resting upon, or to be decided according to the known principles or usages of law, but by the Court's exercising their sound discretion, this Court never takes upon itself to revise such decision; it is to be presumed in all such cases, that County Courts decide right.

In respect to rejecting the testimony of the magistrate, which was offered to show an apparent want of intelligence in the boy, we have examined his deposition, and find it narrates but few, and those, simple facts; which must have required but little exercise of mental power to understand. A party certainly has at all times a right to show the degree of credit testimony is entitled to, which is brought against him; but it is very difficult for any one to measure the capacity of human intellect: we know that a wise man generally appears the reverse of an idiot; but how foolish a person may be, and yet capable of relating simple facts correctly and truly, is the province of the magistrate taking the deposition to determine; and we are bound to believe that no magistrate would take and certify the deposition of a person who was so foolish as not to be entitled to credit. Judgement affirmed.

Wm. Slade, for plaintiff.

Bates & Chipman, for defendant.

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ELIAS HALL vs. ALMIRA HALL.

In ejectment, where the defendant's title is derived from the plaintiff by levy of execution upon the lands in question, he cannot object to the plaintiff's introducing a deed of the same to substantiate his title from a third person, executed to him while defendant is in possession, on the ground that such possession is adverse, even should the levy prove void. Such deed being in confirmation of defendant's title, innures to his benefit.

When an officer extends an execution upon real estate, he must make out and subscribe his return within the life of the same; otherwise no title passes to the creditor—the whole proceeding being void.

This was an action of ejectment for a tenement in Middlebury, tried in the County Court.—Plea, *General Issue.*

In support of his title, the plaintiff gave in evidence a deed of the premises in question, from Jacob Bartholomew, dated September 11, 1809, which was admitted.

For the purpose of showing the title out of the plaintiff, the defendant then offered in evidence a deed of the premises from the plaintiff to Horatio Seymour, dated the 26th of August, 1816, which was admitted.

The plaintiff then offered in evidence a deed from the said Horatio Seymour to himself of the premises, dated the day of 1827. To the admission of this evidence, the defendant objected on the ground that the said deed was void—the defendant at the date thereof being in possession of the premises, claiming the same adversely to the said Horatio Seymour; and offered evidence proving her possession of the premises at the date of said deed.

The plaintiff then offered in evidence an execution in the defendant's favor, against the plaintiff, dated the 4th day of March, 1823, returnable in sixty days from date, and the levy thereof upon the premises in question, dated the 5th day of May, 1823, together with evidence tending to prove that the defendant's possession was under the said levy, and that, therefore, said possession was not such as would render void the said conveyance from the said Horatio to the plaintiff.

To the admission of the said levy, and evidence of possession under it, the defendant objected. The Court overruled the objection, and admitted the evidence.

The defendant then offered in evidence, in support of her title to the premises, the record of a judgement, and

levy of an execution in her favor against the plaintiff, upon the premises in question—said execution dated the 4th day of March, 1823, and returnable in 60 days from date, on which, the officer having the same to collect, returned that he levied the same on the 12th day of April, 1823, upon the premises in question, and on the same day caused the same to be set off and appraised to apply on said execution; which return was signed and sealed by the said officer on the 5th day of May, 1823. To this evidence the plaintiff objected, and the Court refused to admit the same.

The Court charged the jury, that if they believed that the said possession of the defendant was under said levy, they ought to find a verdict for the plaintiff.

To which admission of evidence of possession, under said levy, and rejection of said levy as evidence of the plaintiff's title, and charge to the jury, the defendant made her exceptions, which now come here for consideration.

Slade, for defendant, contended, 1st, That the deed from H. Seymour to the plaintiff, was void under the statute of Oct. 28th, 1807—the defendant being in possession of the premises at the time of its execution, claiming adversely to Seymour. It is true, notwithstanding this statute, that a title purchased by one under whose previous grant of the premises the adverse possession is holden will inure to the benefit of such adverse possessor.—8 John. 137. And with this view, the plaintiff sought to introduce the levy of the execution and evidence of the possession under it.

But the plaintiff contended at the trial, that the levy was void. Acknowledging it then to be void, a subsequent conveyance to the plaintiff could on no principle inure to the benefit of the defendant. If it had been *good* however, the subsequent acquisition of a title by the debtor would not have inured to the defendant's benefit. It could do so but upon two grounds: either on the principle laid down in the case of *Middlebury College* vs. *Cheney*, 1 Vt. R. 349, or upon the principle of *estoppel*. But neither of these principles apply to the case of a title acquired by levy. There are no covenants—no deed—no act whatever, of the debtor.

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But if a subsequently acquired title will not inure to the benefit of the creditor in the case of a *good levy*, much less can it when the levy is *void*. *Such* a levy fails to transfer an estate to the creditor—not because there is nothing in the debtor to be transferred—but because the levy is incapable of transferring any thing. In the case of a *deed* before the acquisition of a title by the grantor, there may be all the legal requisites of a conveyance—something thro' which that title may pass, if its acquisiton can have relation back to the date of the first conveyance. But the levy, if void at all, is wholly void. It can pass nothing at the time, nor can it furnish a channel through which any thing can subsequently pass.

If the levy was *void*, it had no more power to attach itself to a title which the *debtor* might subsequently acquire, than to one which any other person might acquire.—Hence the conveyance from Seymour to Hall was as void as if made to any other person.

But suppose it to be conceded that Seymour's conveyance does inure to Mrs. Hall's benefit—what follows?—does it not give her a title? Can it do any thing else? And if it *gives her a title*, what is the plaintiff contending for?—Why, to defeat the very title which his own argument gives her.

The conveyance from Seymour, is, therefore, believed to be not only within the letter, but within the mischief of the statute.

2d. The next question raised by the case is, whether the defendant's levy was such as to vest in her a title to the premises, supposing a title to have been in the plaintiff.

It is admitted on all hands, that the *extending and levying* must be done within the life of the execution. The necessity of this, results, however, not from any positive enactment, but from the nature of the case. The officer, from the terms of the precept contained in the execution, obviously having no power to arrest the body, or levy on the property of the debtor, after the execution expires.

But the necessity of *recording* rests on no such principle. The execution contains no directions, either express or im-

plied, with regard to it. Nor does it contain any with regard to the *returning*, as we shall presently show, that can affect the present question. For such directions we must look elsewhere.—And where do we find them? No where but in the 3d section of the act relating to the levying and serving executions. There the Legislature have undertaken expressly to legislate on this very subject; and have made it necessary in order to perfect a title, that the execution should be returned, and that the execution and return should be recorded, &c. And there they leave the subject. They fix no time within which the returning and recording shall be done, but merely say that, *being done*, they shall make a good title—that is, that when done, or at whatever time done, the title will become perfected.

The statute does not, however, say that at *whatever time* the returning and recording shall be done, they shall make a good title against all the world—a title that may be set up against any other title from whomsoever, and at *whatever time* derived; but a good title "as against such debtor, his heirs and assigns;" that is, that *from* the time when the returning and recording shall be done, the debtor shall be incapable of communicating any in the premises to his heirs and assigns.

To have an execution and levy which is returned and recorded, say ten days after the execution expires, make a good title against a grantee of the debtor, who receives a conveyance one week before such return and recording, would work manifest injustice; because a purchaser who may have been apprized of the existence of an execution against the debtor, may, upon an examination of the town Clerk's office, and that of the Clerk of the Court, after the execution expires, be led to believe from the absence of any return or recording, that whatever levy may have been made upon the premises has been abandoned, or that the execution is paid and satisfied.

But no such consequences from a delay of returning and recording can result to the *debtor*.

With regard to the question of recording, it has been decided in Massachusetts, (15 Mass Rep. p. 137) that where the statute expressly requires it to be done within three months, in order to make a title in the creditor, it

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may be done even within nine months, upon the principle that the recording in such cases is analogous, in its effects, to the recording of deeds and other instruments of conveyance—the object being to give notice to subsequent attaching creditors and purchasers. The above case is one where the statute expressly required the recording to be done within three months, while our statute, as we have seen, fixes *no time* within which it shall be done.

But it may be said that the execution itself, which is according to the form prescribed by law, (Stat. p. 316) commands the officer to return the same to the office whence it issued, within sixty days from its date.

But this is to compel the officer to return the execution within a given time for the purpose of informing the *creditor* of what has been done in the execution of the process, and fix a limit beyond which he shall be responsible to the creditor if he shall not have obtained the amount of the execution in money, or fastened upon estate of the debtor, or committed him to prison. And of what consequence to the *debtor* can it be, whether this evidence is put upon the back of the execution and returned to the Clerk's office one day before, or one day after the expiration of the sixty days?

In this case it appears by the return on the defendant's execution, thal the levy, appraisal, and setting out, were made on the 12th of April, within the life of the execution. Without this statement, indeed, in the body of the return, it would have appeared that they were made on the 5th of May—the return being dated, at the bottom, on that day; and of course, that they were made two days after the officer *had power* to make them. But because he had not power to make the levy, and cause the appraisal to be made after the sixty days had run, does it follow that, these things having been done when he *had* power to do them, he may not furnish the proper evidence of them to the creditor by the return, and to others by the recording, after the sixty days had expired?

It has been decided, in the case of *Barnard* vs. *Stevens and others*, (2 Aikens p. 429) that if a levy be made within the life of an execution, the sale and *return* may be made afterwards.

There are cases, however, in which the actual return of the execution *within the sixty days*, is, by some positive enactment, made indispensably necessary for certain purposes. Thus it is enacted that the return of *non est inventus* shall be *legally* made upon an execution, in order to charge bail on the original process. What is here meant by a *legal* return, appears in the 34th section of the same act, p. 68, where it is expressly provided that it shall be *regularly* made within sixty days from the rendition of judgement. The same positive enactment is contained in the 4th section of an act in addition to the justice act, p. 139. It thus becomes, by force of a positive enactment, the *essential* thing to be done—answering, in this respect, to the levy, appraisal and setting out, in the case under consideration.—Comp. L. p. 66. *Third persons* are here sought to be charged, and the return of *non est inventus* is made essential to fix their responsibility.

Phelps & Bell for plaintiff.—The first question raised in this case is, whether the deed from the plaintiff to H. Seymour is sufficient to defeat the action. It is contended that it is not. For,

1st, It is a settled rule that a mere trespasser or wrong doer cannot defeat the action where the plaintiff shows a *prima facie title* by showing an outstanding title in a stranger with whom defendant has no connexion.

2dly, The plaintiff was at liberty to introduce the defective levy for the purpose of showing the title under which the defendant claims. This is every day's practice. This being done, the objection to the deed from H. Seymour to the plaintiff fails. For the statute of October 28th, 1807, has never been coesidered to apply to a deed which tends to confirm the title of the party in possession. Such a conveyance is not within the mischief intended by the statute, but is of a contrary character. Hence a deed to a party in possession has never been held void. In this case the plaintiff claims by title derived directly from the plaintiff, and that, subsequent to the deed from plaintiff to Seymour. The release from Seymour to the plaintiff, therefore, inured to the defendant's benefit, and was in confirmation of his title.

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But, 3dly, It was not competent for the defendant to impeach the plaintiff's title as invalid at the date of her levy. As she claimed directly from him, she is estopped from contesting the validity of his title at that time.

This being the case, the only real question here is, whether she derived a valid title from him by the levy in question.

The principal objection to the levy is, that no return was made by the officer of his proceedings under the execution, until some days after the same had expired.

It has been settled in this State, that a return of an execution in all cases, where a return is required by law, shall be actually made and lodged with the Clerk within sixty days from the date of the execution.—*Turner* vs. *Lowrey*, 2 Aikens, 72.

If it be necessary in any case, it is certainly so where the execution is levied on land. The title is not perfected under the levy till the execntion is returned; and if this be not done within the life of the execution, it cannot be done at all.

In the cases of *Stevens* vs. *Adams* (Brayton) and *Turner* vs. *Lowrey*, all that was contended for, was, that if the officer had actually indorsed upon the execution, his return within sixty days, he had a seasonable time to return it to the Clerk. But in this case, the return indorsed is dated May 5th, after sixty days had run, and recorded still later. And if recording is necessary to perfect the title, this levy is without doubt bad.—Vide *Hubbard* vs. *Dewey*, 2 Aikens, 312.

The opinion of the Court was pronounced by

PADDOCK, J.—The Court coincide with the counsel in opinion, that, upon its appearing that the defendant's title is derived from the plaintiff, by levy of her execution upon the lands in question, her objection to the introduction of the deed from Seymour, fails altogether; for if the Statute of 1807 were not in existence, and any thing pased to the plaintiff by the deed, it would certainly inure to her benefit, if she held by conveyance from plaintiff, by deed of warrantee; because, if the title were not good the grantor would be held upon his covenants, as was decided in *Mid-*

dlebury College vs. *Cheney*; and the same principle will apply in this case; because, if the lands levied upon prove not to be the estate of the debtor, the creditor by our Statute Law, p. 213, may revive his judgement and take an *alias execution* against such debtor. And the existence of the Statute cannot vary the case; for in no point of view can we consider that the defendant holding under the levy, was in, adverse to the title of the plaintiff. The defendant is possessed of no title but that derived from the plantiff by virtue of the levy, it is that title which she is now defending. If successfully, it is, because she has made his title her own by the levy. But, if the levy be void, then the title which she holds possession under, must be adjudged the plaintiff's. It has never been doubted but that a defendant in ejectment, holding by virtue of the levy of an execution, might attach the possession of the execution debtor to his own to make out a fifteen years possession, if the plaintiff claimed by adverse title. This question being disposed of, we come to the levy.

To acquire a title to real estate by the levy of an execution, the creditor must have obtained a legal judgement; a legal execution, must be put it into the hands of an officer who can legally levy it upon the estate, causing the land legally to be surveyed and appraised; but notwithstanding all this being done within the life of the execution, yet the creditor has acquired no title to the property, because the officer has made no return of his doings; but two days after, in this case, the officer made his return upon the execution, and whether he caused the proceedings to be recorded we are not told. The Court consider it absolutely necessary that some period should be definitely fixed, in which the doings of the officer shall be complete and the rights of the parties fixed.

If the direction in the execution is to govern, then, all done by the officer after the return day, is void; if two days after the return day has expired, it will be legal for the officer to make and date his return, then, why not two months or two years after? At what period will the six months redemption commence? on the 12th of April when the appraisal was made, or on the 5th of May when the Officer signed and sealed his return? I am not aware that

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the question has ever been directly brought before the Court to determine between the execution creditor and debtor, which of the two acts passes the title; whether it be the completion of the return by the officer on the execution, or the recording in the proper office and filing in the one from which it issued. In the case of *McLellen* vs. *Whitney*, the facts vary materially from the present: it does not appear but that the return on the execution was perfected by the officer before the return day thereof, and further, the officer delivered seisin and possession of the estate to the creditor who quietly enjoyed the same for many years, and then, without being molested, brought an action of debt on his judgement; but the Court considered that the plea in bar ought to prevail, inasmuch as McLellen took possession of the lands from the hands of the officer, perfected the recording afterwards, though not within the three months, and having continued the possession, Whitney acquiescing therein, he should not at that late day, disannul the proceeding. Judge Parker says the record is not made for the benefit of the execution debtor, but community at large. In *Ladd* vs. *Blunt*, 2 Mass. 402, Judge Parsons says, "the lands remain the debtor's unless the creditor has a good title to them by matter of record." We are of opinion that there can be but little doubt if any, that where the officer does not make and subscribe his return until after the return day of the writ, that the whole proceedings are void; and

The judgement of the County Court is affirmed.

Phelps & Bell, for plaintiff.

Slade & Seymour, for defendant.

ADMINISTRATOR of JOHN BURNHAM vs. CYRUS ADAMS.

RUTLAND, *February*, 1833.

Book of accounts may be given in evidence to the jury to support a declaration for goods sold and delivered, in favor of the owner of the book, if the same be accompanied with common law evidence of the correctness of the entries.

Where it becomes necessary, by the agreement of parties, to ascertain the amount of accounts charged on book, the book may be given in evidence to the jury with common law evidence of correctness, for them to find the amount.

This was an action of *assumpsit*, commenced in the County Court, on a promissory note, for $225, payable with interest, dated September 15th, 1821. The note was read in evidence, and it was admitted that the plaintiff's intestate died in August, 1829—that his estate had been represented insolvent, and Commissioners appointed thereon, who had made their return in due form of law.

The defendant then stated the defence to be, that at the time the note was executed, it was agreed between the parties, (the intestate and the defendant) that an account which the defendant had against the intestate for goods sold to him out of the defendant's store, should be applied in payment of the note; and also that such goods as the intestate should afterwards take up outof said store, should also be applied thereon, at their cash price; and that the intestate had taken goods out of the store to an amount more than sufficient to pay the said note, which was regularly charged on the books of the said Adams.

The plaintiff objected to the defendant's giving any evidence to support this statement, on the ground that the articles thus charged were the subject of a claim on book, in favor of the said Adams, against the said Burnham, and should have been presented to the Commissioners on the estate of said Burnham for adjustment.

The Court overruled the objection, and admitted the evidence. To which the plaintiff excepted.

The defendant then gave evidence tending to prove the agreement aforesaid, and also the sale and delivery of various articles from said store, both before and after the execution of the note, as well as the payment of several sums of money. The testimony to prove the sale and delivery of the articles aforesaid, was the deposition of the clerk of the defendant, who testified to the delivery of several arti-

RUTLAND, *February*, 1853.

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cles named in his deposition, and which were charged by him; and also the testimony of another witness, who took goods from the store of the defendant, by direction of the intestate, to the amount of $6,62.

The defendant also gave evidence tending to show that the said Adams, at different times, sold and charged to the intestate various other articles out of his store.

The defendant offered in evidence his books of account containing his charges and account against the intestate, both before and after the execution of the note, accompanied with evidence that they were the books kept in his store during the time the several charges were made, and that they were correctly kept in order to show the amount of the sales by the defendant, Adams, to the intestate. In the account against intestate, were, among other charges, the charges for the goods delivered by the clerk of the defendant. The plaintiff objected to the admission of the books in evidence, and they were excluded by the Court. To this decision, the counsel for the defendant excepted.

The plaintiff contended that he was entitled to recover the whole amonnt of the note, unless the defendant showed that the money or goods were applied in payment of the note, when the same were delivered.

The Court charged the jury, that if they believed from the evidence that such an agreement was made as the defendant contended, they would be warranted in applying all the money and goods which the defendant had proved were received by the intestate, in payment of the note.—That when there was but one claim in favor of a plaintiff, and money or goods or both were paid to such plaintiff by a debtor, the jury would presume that it was in payment of that claim, though there was no evidence that the payment was delivered to be applied to that particular claim.

The jury found a verdict for the plaintiff of * * * and judgement was rendered thereon. The defendant having excepted to the decision of the Court in not admitting the books in evidence as aforesaid, the exception was allowed, and the cause passed to the Supreme Court for revision.

The opinion of the Court was delivered by

BAYLIES, J.—This was an action of *assumpsit* on note for $225. The defendant stated his defence to be, "that at the time the note was executed, to wit, September 15th, 1823, it was agreed between the parties, (the intestate and defendant) that an account, which the defend't had against the intestate for goods sold to him out of the defendant's store, should be applied in payment of the note, and also such goods as the intestate should afterwards take up out of said store, should be applied thereon, at the cash price; and that the intestate had taken goods out of the store to an amount more than sufficient to pay the note, which were regularly charged on the books of the said Adams." The case shows, "that the defendant gave evidence tending to prove the aforesaid agreement, and also the sale and delivery of various articles from said store, both before and after the execution of the note, as well as the payment of several sums of money." After this, "the defendant offered in evidence his *books of account* containing the charges and account against the intestate, both before and after the execution of the note, *accompanied with evidence that they were the books kept in his store during the time the several charges were made, and that they were correctly kept*, in order to show the amount of the sales by the defendant, Adams, to the intestate. The plaintiff objected to the admission of the books in evidence, and the Court excluded them." And the question is, Did the Court err in excluding the books? In several of the States, it has been decided, that books containing accounts, are admissible as evidence to the jury to support a declaration *for goods sold and delivered*, on the party who owns the books, making oath, that the entries are true.—See 1 Dallas, 85, 238, 276.—2 Mass. Rep. 217, 569.—4 Mass. Rep. 455.—13 Mass. Rep. 427.

This is certainly a departure from the common law. In this State, we have not adopted this rule; but here the party may make oath to the truth of the entries on his book before auditors, in an action which he has brought on *book account* according to our statute. But because he may bring an action on *book account*, and make oath to the entries before auditors, the statute does not deprive him of

RUTLAND, *February*, 1833.

Burnham vs. Adams.

his common law remedy: he may still declare for *goods sold and delivered*, and give his book in evidence to the jury, accompanied with such other evidence as the common law requires to prove his declaration. The common law requires, that the entries in the book should be proved by the clerk, or servant, who made them, if such clerk or servant be alive, and can be produced.—1 Esp. N. P. Rep. 1, 328. But it has been settled ever since the decision in Lord *Torrington's* case, that if the entries were made by a clerk, or servant, who is since dead, the books are admissible as evidence on proving the entries to be in the handwriting of such clerk or servant; and also proving his death.—Salk. 285 and 690. In the case at bar, I do not understand that the defendant offered any thing but common law proof, *when he offered his books, and evidence to show that the entries were correctly made against the intestate.* This proof was necessary to enable the jury to ascertain how much had been paid on the note, according to the agreement of the parties, and should have been admitted by the Court.

If the intestate, when the note was given, agreed that the defendant's *account* against him on book should be payment on the note, this agreement *seemed* to make the book containing the *account*, necessary evidence to be submitted to the jury, to enable them to ascertain the amount of the *account* at that time. So the books were necessary evidence to ascertain the amount of goods subsequently delivered by the defendant to the intestate, and charged on book, if it was agreed that such goods should be payment on said note. If there was a dispute about any of the entries made on book, either before or after the giving of the note, such dispute should be settled by the jury on view of the books, and other common law evidence, relating to such entries. On the whole, I am satisfied that the books, and evidence to show that they were the defendant's, and that the charges were correctly made, should have gone to the jury for them to weigh; and inasmuch as the Court excluded this evidence, their judgement is reversed, and a new trial granted.

R. C. Royce, for plaintiff.

Jonas Clark, for defendant.

GARDNER GATES VS. JUDSON GOREHAM.

RUTLAND, *January*, 1833.

What recovery shall, or shall not, be a good bar to a subsequent action.

This was an action of *trover*, tried by the Rutland County Court, April Term, 1832, to recover the value of thirty sheep.

The plaintiff offered evidence tending to prove the taking, and also a demand and refusal. The plaintiff also showed a contract in writing, (a copy of which is made a part of this case,) between him and the defendant, made at the time said sheep were delivered. And the defendant gave in evidence the record of a former judgement in *assumpsit*, predicated upon this written contract between him and the plaintiff, in which the plaintiff recovered *ten cents damages* and *one dollar and fifty cents costs*. And the plaintiff offered to show that at the trial of the former suit, which was before a referee, the referee decided, that the construction to be put upon this contract in writing, was that, at the end of the year, the thirty sheep belonged to the plaintiff, and that at the time of bringing said suit, they were the property of the plaintiff, and that inasmuch as the pluintiff had proved no demand, he could not recover for the value of the sheep; but that as it was the duty of the defendant to have returned the sheep at the expiration of the year, he was liable in damages for not having so returned them; and thereupon found for the plaintiff to recover *ten cents* damages.

The Court decided that the evidence so offered was inadmissible, and the defendant recovered. To which decision the plaintiff excepted. The exception was allowed, and the case now comes here for re-examination.

COPY OF THE CONTRACT.

"*Rutland*, 12*th November*, 1827.

"This instrument is to certify, that I, Judson Goreham, do agree to pay Gardner Gates or order, thirty good, likely sheep, which are to average half-blooded Merino, of good quality—none to be over two years old, and none to be under one year old.—There is to be sixteen ewes, and fourteen weathers.—The said sheep are to be returned in one year from date, in good order—it being for value received.

"(Signed,) JUDSON GOREHAM."

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Gates vs. Goreham.

The record in the suit, alluded to in the bill of exceptions, shows that the plaintiff counted upon the agreement above mentioned, as follows:

"In a plea of the case, for that whereas heretofore, to wit, on the 12th day of November, 1827, the defendant, for value received, promised the plaintiff to pay him or order, thirty good, likely sheep, to average half-blood Merino, and of good quality. None of said sheep were to be older than two years old, and none younger than one year old —Sixteen of said sheep were to be ewes, and fourteen weathers. The above named sheep were to be delivered to the plaintiff one year from the date thereof, in good order; yet the defendant hath not delivered them to the plaintiff, though often requested so to do. Also, in an action on the case, for that whereas heretofore, to wit, on the 12th day of November, 1827, the defendant and plaintiff entered into an agreement in the words following, to wit: "Rutland, November 12th, 1827. This instrument is to certify, that I, Judson Goreham, do agree to pay Gardner Gates or order, thirty good, likely sheep, which are to average half-blood Merino, of good quality—none to be over two years old, and none under one year old: there are to be sixteen ewes and fourteen wethers.—The said sheep are to be returned in one year from date, in good order—it being for value received. Judson Goreham." Signed as above by the defendant. Yet he, the said defendant, hath not delivered to the plaintiff the said sheep, though the time for the delivery or payment of said sheep has long since expired, to the damage of the plaintiff seventy-five dollars."

On the trial of the suit, which was originally before a Justice of the Peace, a judgement was rendered for the plaintiff to recover $37,69 damages, and his costs.

The suit having been carried up to the County Court by appeal, it was there referred to R. Pierpoint, Esq., who found for the plaintiff to recover *ten cents* damages and his costs. The report was accepted by the Court, and judgement rendered thereon.

In this suit, the plaintiff's declaration in trover for the sheep is as follows:

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"In a plea of the case, for that the plaintiff, at Rutland aforesaid, on the 13th day of November, 1828, was possessed of thirty sheep, of the value of one hundred dollars, as of his own goods and chattels, and being so possessed of said sheep on the same day, afterwards lost the same; which said sheep afterwards, on the same day, came into the possession of the said Judson, the defendant, by finding; and the said Judson well knowing the same to be the property of the said Gardner, though requested, hath not delivered the same to the plaintiff, but afterwards, on the same day, converted the same to his own use."

To this declaration, the defendant pleaded, 1st, The General Issue.—2d, In bar, the facts set forth in the defendant's record of the first suit, with an averment, that the cause of action in that suit, for which a recovery of ten cents damages, and $1,50 costs was had, is the same as the cause of action in this suit.

The plaintiff replies, that the causes of action are not the same.

The opinion of the Court was pronounced by

Baylies, J.—The contract between the parties, of which the above is a copy, is doubtful on the face of it. From the words in the first three lines, "I do agree *to pay* thirty sheep," one would suppose, that this was a promissory note for sheep, and the plaintiff could have no interest in them, before they were paid. But from the words in the 6th and 7th lines, "the said sheep is (are) *to be returned* in one year from date," one might suppose the defendant took the sheep of the plaintiff, who still remained the owner of the sheep, which the defendant was *to return* to the plaintiff in one year. But both of these constructions cannot be right. If we reject the word "*pay*," in the second line, and substitute the word "*return*," there would be no great difficulty in understanding this contract, as it was, probably, understood by the referee, when he decided the first suit; that is, that the plaintiff was the owner of the sheep. Whether the referee should, or should not have found the value of the sheep, we do not decide. It is however clear, that the referee, when he found only *ten cents* damages and costs, did not intend to find for the plaintiff the value of the sheep; but found the *ten cents*

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damages and costs for some supposed injury, which he considered was warranted by the evidence before him.—The record of the first suit does not show, that there was any evidence before the referee of a *conversion* of the sheep by the defendant, so that the plaintiff could maintain trover for them. The non-delivery of the sheep at the time agreed upon was not a *tortious* conversion on the part of the defendant. This principle of law is recognized by Lord Ellenborough, in the case of *Severin* vs. *Keppell*, 4 Esp. N. P. R. 156.—He says, "that what begins in contract, a non-performance of what the party so undertakes to do, or a bare non-delivery of what he undertakes to deliver, is not to be considered as of itself amounting to a *tortious* conversion."

Now, if the non-delivery of the sheep, at the time agreed, was not a *tortious* conversion, then it was necessary for the plaintiff, before he brought his action, and subsequently to the day when the sheep were to have been returned, to demand the sheep of the defendant, in order to maintain trover for them. It *seems* such demand was made by the plaintiff, and the defendant refused to return the sheep.—This *demand* and *refusal* is sufficient evidence of a *conversion* of the sheep by the defendant; which *conversion* is the *cause of action* for which the defendant is sued in trover.—This *cause of action* cannot be the same as the one described in the record of the first suit. If the *causes* of action are not the same, will it be pretended that the recovery of *ten cents damages* and *one dollar and fifty cents costs* in the first suit, will bar a recovery in the second suit, being an action of *trover* and *conversion* for the *value* of the sheep? In the case of *Kitchen et al.* vs. *Campbell*, 3 Wils. 304, the Court say, "You shall not bring the *same cause* of action twice to a final determination; *nemo debet bis vexari*, upon this we found our judgement: and what is meant by the *same cause of action* is, where the *same evidence* will support both the actions, although the actions may happen to be grounded on different *writs*; this is the test to know whether a final determination in a former action is a bar or not to a subsequent action; and it runs through all the cases in the books, both in *real* und *personal* actions."

In the case at bar, it cannot be said, that the evidence, which was sufficient to support the first action, was sufficient to support the second. It did not tend, at all, to prove a *conversion* of the sheep by the defendant.

In the case of *Lacon* vs. *Barnard*, Cro. Char. 35, it was decided that a recovery of *two pence* damages, and *six pounds* costs, in an action of *trespass*, for taking and driving away a flock of sheep, is no bar to *trover* for the value of said sheep, if the plaintiff reply that the recovery was only for the *taking* and *driving* away, and not for the *value* of the sheep. "The damages of two pence given for 89 sheep being so small, is in itself an implication (and the Court shall so intend it) that it was given only for the *taking* and *driving* of them, and that the plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the plaintiff should thereby lose the property in them, and have nothing for his sheep but *two pence*, and the defendant should have the sheep: but the law will rather intend (and so it may be averred) that those damages were given only for the *taking* and *driving*, and that the plaintiff had them again, and afterwards lost them, and that the defendant found and converted them, &c."

Some of this reasoning will apply to the case at bar.—The law will intend almost any thing, before it will intend, that the *ten cents damages* were allowed by the referee in the first suit for the *value* of the plaintiff's thirty sheep.

The plaintiff offered to prove by parol, what construction the referee gave to the written contract of the parties on the trial of the first suit before him; and also to show for what he found the *ten cents damages*. This evidence was rightly excluded by the County Court, whose duty it was to construe the written contract themselves without reference to the construction which was given it by the referee. And without parol evidence, the law would presume that the *ten cents damages* were not found by the referee for the *value* of the sheep.

As we are not satisfied that the causes of action are the same, or that the same evidence would support both ac-

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tions, the judgement of the County Court is reversed, and a new trial is granted.

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Merrill & Ormsbee, for plaintiff.
Royce & Hodges, for defendant.

WELLS VS. WESTHAVEN.

RUTLAND, *January*, 1833.

Prior to the statute of 1817, a wife had a derivative settlement from her husband, and children from their father.

When a widow gained a settlement in her own right, her minor children living with her, took her settlement.

But when a widow gained a settlement by marriage, her children by a former marriage did not follow her settlement thus obtained.

While the act of 1801, in relation to warning out was in force, it was not necessary to warn out minor children living with either of their parents, to prevent their gaining a settlement.

A female child being with her mother in the family of her father-in-law, for more than a year, without being warned, did not thereby gain a settlement in her own right.

On the trial of this case, which was on an appeal by the town of Westhaven from the order of removal of two justices, of Delia Turner, a pauper, from the town of Wells to said town of Westhaven, both in Rutland County, on issue, joined to the Court, of "unduly removed, alleging that the place of the last legal settlement of the said Delia, was not in said town of Westhaven," it appeared in evidence that the said Delia was the daughter of ——— Turner and Electa his wife, and was born in Middlebury, in the County of Addison, in April, A. D. 1802, at which place the said Turner, the father, resided at that time, a period of over one year.—That when the said Delia was about nine months old, the said Turner removed with his said wife and daughter to Chesterfield, in the State of New-York, where, and at Peru in said State of N. York, he resided with his said family ten or eleven years; from which place, or State, said Turner, with his said family, removed to Cornwall, in the County of Addison, where he resided with them less than one year, when the said Turner died.—That the said Electa and said Delia then removed to Fairhaven, in Rutland County, where they resided

until April, 1814; and in the said month of April, 1814, the said Electa was married to Ichabod Mitchell, of Westhaven, who then, and for a long time before, had lived in Westhaven; and immediately, with the said Delia, her daughter, went with her said husband to said Westhaven, and there resided with said Mitchell until November, 1819, when the said Mitchell and said Electa removed to the said town of Wells, where she has resided ever since—the said Mitchell dying in said Wells, where he had resided ever since he removed to that town, in August, 1829.—That the said Delia resided at said Westhaven from April, 1814, with said Mitchell and Electa, until the two latter persons removed to Wells, in November, 1819; and the said Delia continued to reside in said Westhaven four or five years after said Mitchell and Electa removed to said Wells, in 1819—then went to Orwell, in said County of Rutland, and there resided about two and a half years; and then returned to said Westhaven, where she resided till September, 1829, when she went to live with her mother in Wells, where she resided until removed.

The Court charged the jury, that the said Delia did not gain a settlement in Westhaven by her residence as aforesaid; and that, although her mother, by her intermarriage with Mitchell, acquired his settlement in Westhaven, yet that settlement was not communicated to her daughter by a former marriage; and as there was no evidence of the said Delia the pauper's having gained a settlement in Westhaven, except by her residence there under the circumstances before mentioned, she did not thereby gain a settlement in Westhaven.

The jury, thereupon, returned a verdict for the town of Westhaven.

The plaintiff excepted to the opinion of the Court, contained in the charge.——

Whereupon, The case passed to this Court for further adjudication.

Argument for the plaintiff.—On hearing of this case, the counsel for the plaintiff will submit, that the order of removal of the justices ought to beaffirmed, upon the following considerations:

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1. Whatever may have been the place of the pauper's settlement, at the death of her father, as her mother become legally settled in Westhaven, on her marriage with Mitchell, in 1814, the settlement of the daughter, under age, and residing with the mother, followed of course; and since the emancipation of the pauper, she has acquired no settlement elsewhere. For,

2, By statute, Nov. 4, 1817, p. 381, "Legitimate children have the settlement of their *parents*." The word in the plural, cannot, reasonably, mean *both parents*, when *one* has deceased; but *either*, in such case; and so are the authorities.—1 Black. Com. 363, and note, 25.—2 Str. 746, Parishes of Paulspury and Woodend.—2 Ld. Raym. 1473.

3. Whether a woman, after the death of her husband, acquire an *original* settlement, or a *derivative* one, it would seem that it ought to be followed by the same results, respecting the settlement of her children, under age, and residing with her.—5 Con. Rep. 584.

It is the policy of the law, and a dictate of justice, as well as a right essential to personal liberty, that families are not to be separated, without necessity.—1 Str. 544.—5 East. 118, *Rex* vs. *Eltham*.—1 Black. Com. 361.—1 Str. 438, *Eastwoodhey* vs. *Westwoodhey*.

Argument for the defendant.

1st, That the pauper's place of legal settlement in this State, is that of the last legal settlement of her deceased father, Isaac Turner; which, as appears from the case, was in Middlebury, in the County of Addison.—Jac. L. Dic. Vol. v. p. 216.

2d, That Electa Turner, the mother of the pauper, having acquired a new settlement for herself, in April, 1814, by her marriage to Ichabod Mitchell, did not in any respect alter or change the previous settlement of Delia, but Delia still continued to hold the settlement of her father.—2 Com. Dig. Vol. 4, p. 886.—1 Carthew & Salkeld, 482.—Burrows' Settle. Cases, 2 749.—Carthew, 449.—2 Salkeld, 528.

3d, That inasmuch as it does not appear, that Delia Turner, the pauper, has resided in Westhaven for the term

of seven years, since she attained the age of eighteen years, she has gained no legal settlement therein.

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The opinion of the Court was pronounced by

WILLIAMS, J.—The pauper was removed from Wells to Westhaven: it was therefore incumbent on the former town to show a settlement in the latter: for that purpose, they rely on the fact that her mother acquired a settlement in the town of Westhaven, by her marriage with Mitchell, in the year 1814; and that her daughter derived a settlement from her in the same town. It appears that the father of the person removed, after the passing of the statute of 1801, in relation to settlements, resided in the town of Middlebury more than a year, and that the pauper was born in that town in the year 1802. There was no proof that he was warned out, during that residence. This of course gave him a settlement in that town, which was also the settlement of his daughter, unless she acquired a settlement in Westhaven. In the enquiry whether she had thus gained a settlement, we must be governed by the law as it existed previous to the passing of the statute of 1817, as it is not contended that she has acquired any settlement since. Previous to the passing of the latter statute, there was no statute of this State which directly gave the wife the settlement of her husband, or children the settlement of their parents; but a settlement was gained by marriage by construction of law, independent of any statute. Although no provision upon this subject was expressly enacted, yet the principles of the common law, in relation to derivative settlements, were adhered to in this State. The wife and children being incapable of gaining a settlement for themselves, and being dependent for support on the husband and father, who has the control both of their persons and personal services, derive from him his settlement, which they retain until they gain a settlement for themselves in their own right. As the law in relation to derivative settlements depended upon the principles of the common law, and not on any statute regulations, the decisions which have been had in the Courts of common law in England, are authorities on any question upon this subject arising anterior to the session of the Legislature in 1817, the

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same as upon any other question arising out of the common law.

Upon examining these authorities, it will be found that the decisions have been uniform—that although where a father gains a settlement for himself, it is communicated to his minor children, whether living with him or not; and after his death, when the mother, a widow, acquires a new settlement in her own right, this is also communicated to her minor children; yet a settlement which she acquires by marriage is not communicated to her children by a former husband, but they still retain the settlement of their father. Probably the reason for this distinction was, that the second husband has no legal control over the children of the first husband, is not bound to support them, nor entitled to their services. But whatever may be the reason, the law is so settled, both in England and this country.—*Cumner* vs. *Milton*, 2 Salk. 528.—*Woodend* vs. *Paulspury*, 2 Ld. Ray. 1473.—*Freetown* vs. *Taunton*, 16 Mass. 52.—*Dedham* vs. *Natick*, do. 135.

Judge Reeve, to whose memory and whose worth, a just and elegant tribute has been paid by one of my brethren, (4 Vt. Rep. 347) states the law to be the same in Connecticut.—Reeve's Dom. Rel. 298. Nor is the principle impugned by the decision in the case of *Danbury* vs. *New-Haven*, 5 Con. 585, which was so much relied on by the counsel for Wells.

These authorities are decisive of the case before us, unless it should be considered that the pauper gained a settlement in Westhaven by her residence there for more than a year without being warned out. This will depend upon the decision of the question whether she was liable to be warned out by virtue of the statute of 1801. It appears that she went with her mother to Westhaven, to reside in the family of her step-father, Mitchell, being then only twelve years of age; and may be considered as going there for education.

An infant gains no settlement in his own right, until emancipated from the family of the father or mother.—Emancipation is defined to be contracting a new relation inconsistent with being part of the family. There is nothing in the case which shows that the pauper was thus

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emancipated. The statute which provided for warning out persons moving into and residing in any town, could have contemplated only those who were at liberty to act for themselves, or were emancipated from the family of their father or mother, and never was intended to apply to infants, who, though destitute of parents, went into a town for education, or those who went for the same purpose under the care & protection of a parent or friend. The pauper, under the circumstances in which she went to Westhaven, was not liable to be warned out of town, nor did she acquire a settlement by her residence there without being warned. She was living with Mr. Mitchell, who was *quasi* a guardian, for the purpose of education only.

There was formerly a statute in Massachusetts similar to our statute of 1801, and it has been decided in that State, that it was not necessary to warn out slaves, servants, or minors, to prevent their gaining a settlement, or an illegitimate child, who, at the age of eleven years, was abandoned by her mother, and left her, and resided in another town until long after she was of age, but that the child retained the settlement of her mother.—*Winchendon* vs. *Hatfield*, 4 Mass. 123.—*Somerset* vs. *Dighton*, 12 Mass. 383.

The result to which we have arrived, from a consideration of the case, is, that the pauper has gained no settlement in Westhaven, and was unduly removed.

The judgement of the County Court is therefore affirmed.

Harmon & Royce, for Wells.

Kellogg & Ormsbee, for Westhaven.

RUTLAND; *January.* 1833.

NOAH D. HART VS. OLIVER M. HYDE.

If an officer attach goods, and afterwards sell the same on an execution, and the purchaser take the receipt of a third person in whose possession they are for the same, trespass may be sustained against the officer, if the property was not liable to attachment.

A cooking stove is protected from attachment as a necessary article of household furniture.

To deprive the general owner of chattels of the action of trespass by reason of a possesson of another, it must appear that the former has parted with the *right of possession* for a specific time.

CASE STATED.

This was an action of *trespass*, brought to recover the value of a cooking stove and pipe, which had been levied upon and sold under an execution in favor of Hyde against Hart. Hyde was the purchaser of the stove at the Sheriff's sale. The stove had previously been used by Hart as a cooking stove, & was his only stove. About three months previous to the attachment, Hart had temporarily suspended house-keeping, and placed the stove in the possession of one Lewis, who was to keep it, and pay a reasonable rent for the use of it, until it should be called for by Hart. When the stove was attached on mesne process, Lewis receipted it to the officer, and retained the possession and use of it, until it was sold on the execution, when he also receipted it to Hyde, and still continued in the use and possession of it. The stove had not been removed at any time, nor in any manner disturbed; but Lewis retained the occupancy of it, after, as before the levy and sale. Subsequently to the sale, but before the commencement of the suit, Hart called on Lewis for the stove, who declined delivering it up to him. Hart then brought an action of *trespass* against Hyde, before a Justice Court, and recovered judgement the 3d day of March, 1832, for $12, 9 cts. damages, and his cost. An appeal was entered to the County Court; but without taking the opinion of the Court below, a verdict was taken for the plaintiff for the value of the stove, with liberty to the plaintiff to move to enter a non-suit, if this Court should be of opinion, that the plaintiff could not recover in this form of action. It is also agreed, that if the Court should be of the opinion that the plaintiff ought to recover in this action, the damages shall be assessed at $12,09, with interest from the 3d March, 1832.

R. R. Thrall, for plaintiff.—1st, Does the sale of a chattel by the Sheriff, on execution, constitute such a transfer of the property as will enable the plaintiff to sustain trespass? The plaintiff contends that the sale by the Sheriff on execution is a perfect transfer of the property to the purchaser. Had the plaintiff taken the property from Lewis after the sale, he would have been a trespasser.

2d, Was the possession of Lewis, in the first instance, the possession of Hart? Lewis was the bailee of Hart, and his possession was the possession of Hart. The stove was placed in his possession for safe-keeping, and Hart had the right to the actual possession at any time; and is unlike the cases where the property had been rented for a definite period.

3d, A cooking stove is such an article as is protected by the statute.—2 Ch. Rep. 68, *Crocker* vs. *Spencer*.

S. Foot & R. C. Royce, for defendant.—This case presents the questions, whether the mere levy of an execution upon a personal chattel, without injuring it, removing it, or changing the possession of it, is such an act as of itself amounts to a *trespass, vi et armis;* whether the plaintiff had such a possession as would enable him to bring the action; and whether under the circumstances, the stove was exempt from attachment.

As to the *first* point, the acts for which *trespass* lies, may be the *taking away* the personal chattel from the owner or possessor; the destroying it, or the doing some damage to it. In this case, there was no damage to the stove—none complained of.—No actual force was exercised: the law itself can imply none, without an actual disturbance or detention of the article, in the use and occupancy of it, by the owner or possessor. No direct and immediate injury resulted to the owner. At most, only indirect or consequential injury could accrue to him. So that *trover* or *case* only, and not *trespass*, could lie for the act here complained of.

The simple act of a peaceable entrance into another's house, even by an officer, and the writing out on the execution a certificate of a levy upon any personal chattel in the house, without removing, detaining, or even touching

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it, is not such an act as will subject him to the action of trespass.

The subsequent *bona fide* purchase of the stove at the sale by Hyde, was not a wrongful conversion of it. A *bona fide* purchaser of a chattel, at a vendue sale, is not a trespasser, though the property have been wrongfully taken and sold. Trover only, and not trespass, can be bro't in such case, for the recovery of its value.

In the second place, an *actual* or *constructive* possession of the chattel is necessary to enable the owner to maintain trespass for taking.—4 T. R. 489, *Ward* vs. *Macauley et al.*—4 B. & A. 590, *Croft et al.* vs. *Allison*. The action of trespass is founded on possession, of trover upon property. In this case the plaintiff had not the possession.—Hart had parted with the possession of the stove to Lewis, and was receiving rent for it. Although Hart was at liberty to call for the stove when he pleased, he cannot be considered as having a constructive possession, before a demand was made. The case is distinguished from that of a servant, or carrier, or a mere bailee, with remuneration for keeping, or carrying. In these instances, the owner is not supposed to have parted with the possession, and can maintain trespass for taking. The possession of a mere bailee, carrier, or servant, is not coupled with any interest in the chattel. In this case, the possession of Lewis was coupled with a direct and exclusive interest in the stove, until demanded by Hart, and he would have been held accountable to Hart for an injury done to it. It matters not that the possession was not given for a specified time. Lewis' possession of the stove was as exclusive, and his interest as direct, previous to a demand by Hart, as if he had taken it for a definite length of time. Hart then could maintain *trover* only for the taking of the stove from Lewis previous to its having been demanded.

As to the third point, a cooking stove is not exempt from attachment except when *actually appropriated* to the use designed for it.—2 Chip. R. 68, *Crocker* vs. *Spencer*.

The opinion of the Court was delivered by

PHELPS, J.—It is insisted that no act of the defendant appears in the case, which amounts in law to a trespass.—

But we are all agreed, that the act of the Sheriff, in assuming the custody and control of the property, was clearly a trespass; and, if done by direction of the defendant, was a trespass in him. There was a literal *taking* of the property—a seizure on the attachment, as also on the execution, and the placing it under the control of a third person to the exclusion of the plaintiff.

To constitute a trespass, it is not necessary that there should be actual force exerted upon the property. It is enough, if by menace, threat, or exercise of legal process, the owner is excluded from the possession and control of it. If no possession is taken by an officer on an attachment, perhaps the mere return of an attachment would not subject the officer to this action; but if the possession and control are assumed, to the exclusion of the owner, the action lies.

If an officer seize property on execution, and sell it, the trespass is complete, whether the purchaser remove it or not; provided he assumes the control and disposition of it. It is such an unlawful interferance with the property of another as constitutes an immediate injury; and the party injured is not bound to litigate the question with the purchaser.

It is further insisted, that the plaintiff cannot recover in this case, for want of possession in him at the time of the trespass.

The ownership of chattels draws after it the legal or constructive possession, and this is sufficient for the purposes of this action. If indeed the owner had parted with the right of possession, for a specific period, he cannot maintain trespass for an act done during that period: but if he have the right of resuming the possession at pleasure the action lies. Hence it is not necessary that the plaintiff have actual possession; it is sufficient if he have the right of possession. See *Putnam* vs. *Wiley*, 8 John. R. 432; also 2 Pick. Mass. R. 121; 3 do. 255; 5 do. 177; 7 Conn. R. 232.

Mere delivering to an agent to keep, with the right of resuming the possession, *ad libitem*, will not defeat the action, see *Thorp* vs. *Burling*, 11 John. R. 285.

The reason of the distinction is this, trespass is an inju-

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ry to the possession, and the immediate injury is to him who has the right of possession. If Lewis in this case had the right of possession, the right of action would be in him; but as he had no such right, he sustains no injury, but the right of action is in the plaintiff.

Another point in the case is, whether the stove in question was subject to attachment; if so the defendant is justified by his process. But it has already been decided.—*Crocker* vs. *Spencer*, 2 D. Chipmans R. 68, that the article is protected by the Statute, from attachment, as a necessary article of household furniture.

We are not disposed to question the propriety of this decision. The reasons in favor of it, are perhaps stronger now than they were when it was made. Since the general introduction of this article, as one of common use, many dwellings, and especially those occupied by the poorer class, are constructed with a view to the exclusive use of it, and would be uninhabitable without it. Perhaps there is no article found in the dwellings of the poor which might not be as easily dispensed with. It is an article of permanent necessity; and the temporary suspension of the use of it, in this instance, does not render it unnecessary. There is scarcely any protected article, which is always in actual use; and if we were to hold such articles attachable, because not actually in use at the moment, the protection would be of little service. The humane purpose of the Statute would not be answered. It is said that the plaintiff had discontinued house-keeping; but the fair presumption is that this was temporary and with a view to resume it.

Judgement for the plaintiff, according to the agreement.

William Vaughn Adm'r. of John W. Mott vs. Jaazaniah Barret, Jun.

Rutland, *January*, 1833.

An administrator appointed in another State has no authority to discharge a debt due from a citizen of this State to his intestate; and if administration is granted here, such discharge would be no bar to an action for the debt.

This was an action of debt on judgement brought by Wm. Vaughn, Administrator upon the estate of John W. Mott, deceased, late of the City, County and State of New York. The writ in this case was dated and served on the first of September, A. D. 1831. It was alleged in the declaration that the judgement was recovered by John W. Mott, aforesaid, against the defendant, by the consideration of the Rutland County Court, at their term, began and holden at said Rutland on the 2d Monday of Sept. A. D. 1826, for the sum of four hundred and fifty-seven dollars and nine cents, for damages and costs, and that no part of said judgement has been paid except $309,88, being part of the damages which had been allowed against the estate of Erastus Barker, leaving the sum of one hundred and thirty-six dollars and two cents damages, and the further sum of twelve dollars and nine cents costs, making in whole $148,11, being the residue of said judgement. The defendant pleaded that after the recovery of said judgement and before the commencement of this suit, to wit, on the 20th of October 1827, Henry Mott of the said city of New York, was regularly appointed administrator by James Campbell, surrogate of the said city of New York, upon the estate of the said John W. Mott; and that afterwards, to wit, on the 24th day of November, A. D. 1830, the said Henry Mott as administrator as aforesaid, for a valuable consideration executed to the said Jaazaniah a discharge of said judgement in favor of said John W. Mott.

To this plea, the plaintiff replied that prior to the said 24th day of November, A. D. 1830, the time at which the said Henry Mott discharged the judgement, to wit, on the third of of April, A. D. 1830, the said Willam Vaughn was regularly appointed administrator upon the estate of the said John W. Mott, by the Probate Court for the district of Rutland, but there was no profert of the records of said probate Court. And that the defendant at the time of the

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recovery of the said judgement against him in favor of the said John W. Mott, and long before and ever since, has been and still is an inhabitant of the State of Vermont, residing in said Probate District, and not a citizen or inhabitant of the State of New York. To which replication there was a general demurrer and joinder in the demurrer. The County Court rendered judgement for the plaintiff, and the defendant excepted; whereupon the case comes here for reconsideration.

Moses M. Strong, for defendant.—1st. The action of debt on judgement is a transitory action and the intestate, John W. Mott could in his life time have maintained an action on the judgement here declared upon, in the State of New York, as well as in this State. *Mills* vs. *Durgin*, 7 Cranch, 481; *Hampton* vs. *McCoural*, 3 Wheat. 234; *Watson* vs. *Bourne*, 10 Mass. 337; *Andrews* vs. *Montgomery*, 19 John. 162; *Hubbell* vs. *Coudrey*, 5 John. 132; *Post* vs. *Neafie*, 3 Caines 22.

2d. Hence, Henry Mott, administrator in the State of New York having the same rights that his intestate had with regard to this judgement, within that State, could have maintained an action of debt upon it, if the defendant had chosen to submit himself to the jurisdiction of the courts of the State of New York. 9 Cowen 34; Selw. N. P. 790, or (new edition) 2 Selw. 5 notes, 8 D. *Murray* vs. *Blachford*, 1 Wendal, 583; *Gage* vs. *Johnson*, 1 McCord, 492; *Gleason* vs. *Silley*, 1 Aik. 28.

3d. As a person is always justified in paying what he is under a legal obligation to pay, the defendant in this case is justified in paying to Henry Mott, and his discharge is a legal and valid discharge of the judgement here declared upon. Big. Dig. 309; *Stevens* vs. *Gaylard*, 11 Mass. 256.

J. Clark, for plaintiff.—The question here is as to the validity of a foreign administrators right.

1st. Henry Mott, by virtue of his appointment as administrator of John W. Mott, in the State of New York, by competent authority there, acquired no interest in, or control over the demand in question, as by the pleadings it is shown to be the effects of the deceased within this State. And as he could not, as such administrator, maintain an

action to recover the demand in this state, he could not in that capacity discharge it; nor could he discharge the right of action vested in an administrator duly appointed here.

2d. It will not be contended that an administrator duly appointed in this State, cannot maintain an action to recover the effects of his intestate within this state. And it would involve the greatest absurdity, to suppose, that an administrator deriving his authority from the laws of this state can prosecute and sue a demand, and another administrator deriving his authority from a foreign and distinct government, have power to discharge the action and the right of action, and subject the former to the cost, and even the costs and charges of administration. Indeed if an administrator appointed in this State, has any control over the effects of his intestate within the same, he obviously must have the entire control; for in this respect he cannot have concurrent powers with a foreign administrator. The power of the one must necessarily exclude that of the other.

3d. In England, if a man dies having effects in two provinces, administration shall be granted in both. 3 Bac. Ab. Exrs. E. p. 36. So if he has goods in England and in Ireland, administration shall be granted by the Archbishop of Canterbury, for the goods in his Province, and by the Archbishop of Dublin for goods in his.

4th. The principal contended for by the plaintiff has been long since settled by this Court, and the decision in no wise overruled nor shaken. *Adm'rs. of Dodge* vs. *Whitmore*, Bray R. 92; *Lee* vs. *Havens*, Bray R. 93.

PHELPS, J.—It appears that John W. Mott, being a citizen and resident of New York, obtained a judgement against the defendant, and afterwards died in New York. Administration of his effects was there committed, by the Surrogate, to Henry Mott, and administration of the effects of J. W. Mott in this State, was granted to the plaintiff, by the Probate Court, for the District of Rutland within which the defendant resided. Subsequently the defendant obtained a discharge from Henry Mott, and, the

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plaintiff having brought this action, the defendant pleads that discharge in bar. The question is, will the discharge avail him? The disposition of effects left vacant by the decease of the owner, has ever been regarded as a matter strictly of local jurisdiction. It is indeed a proceeding *in rem*; and in every country, is considered as falling within the jurisdiction of the particular State, Province or District, in which the effects are situate.

In England, where this subject is committed to the ordinary, if there are effects in two dioceses, administration must be taken in the Provincial Court; and if there are effects in two provinces, *i. e.* within the jurisdiction of two Arch-Bishops, administration must be taken in both. The reason given is, that they are each Supreme Jurisdictions, and neither can act in the other. Bac. Ab. tit. Exors. E. Hardress, 216; 1 Salk. 39-40; 3 Bla. Com. 509.

So no notice is taken there, of administration granted abroad, nor does a grant of administration in England extend to the Colonies.

The same view of the subject has ever been taken in the United States. Hence, an administrator appointed in a foreign state, has no authority in the United States.—*Grosvenor* vs. *Harris*, 1 Dall. 456; *Dixon* vs. *Ramsay's* Exors, 3 Cranch, 319; *Lewis and ux* vs. *W. Farland*, 9 Cranch, 157; *Select-men of Boston* vs. *Boylston*, 2 Mass. R. 384.

So letters of administration granted in one of the States are of no authority in another. This point has been repeatedly decided by the Courts of the United States. See 1 Cranch, 259; 3 do. 319; 3 Day's R. 304. It has been so held in Maine, see 5 Greenl. Rep. 261; in New Hampshire, see Ad. N. H. Rep. 198; in Massachusetts, see 3 Mass. Rep. 514; 2 do. 384; 5 do. 67; 8 do. 586; 11 do. 256. In Connecticut, see 3 Day, 74; 4 do. 87. And similar decisions have been had in Virginia, Kentucky, Ohio, and North Carolina.

So far indeed has this doctrine been carried, that in some states, they do not hold an administrator appointed abroad responsible within their jurisdiction, nor an administrator appointed within the state, responsible for effects received out of their jurisdiction. See 2d 5th & 8th, Mass. R. cited above.

This subject has also been before our Courts, and similar decisions had. See Brayton, 92, *Adm. of Dodge* vs. *Whetmore*; also, *Lee* vs. *Havens*, ib. 93. The case of *Lee* vs. *Havens*, is strictly in point with the present. In that case an administrator appointed in Massachusetts, had attempted to evade our jurisdiction, by indorsing a note due from a citizen of this State to his intestate there. A suit was brought by the endorsor, but the Court held the indorsement nugatory as the administrator had no interest in, or control over, the note in question."

In short, if the Courts of this State have jurisdiction, it follows that the Courts of no other State can have. The idea of a concurrent jurisdiction, in such a case, is aburd and impracticable.

If any reason be necessary to show the propriety of the decisions on this subject, it is found in the obvious propriety, not to say necessity, of protecting the rights of our own citizens who may be creditors of the intestate. To suffer the effects of the intestate to be eloined, without attending to these rights, is an act of comity to other jurisdictions, which no state does, or will exercise.

An idea seems to have been entertained, that the jurisdiction over the debt in this case, followed the person of the creditor. But it is to be observed, that jurisdiction, or the right of administration in respect to debts due a deceased person, never follows the residence of the creditor. They are always *bona notabilia*, unless they happen to fall within the jurisdiction where he resided. See Bac. Ab. Exors. E. Cro. Eliz. 472. Judgements are *bona notabilia* where the record is; (Ld. Rayd. 855; Carth. 149; 8 Mod. 244; Anon. 6 Geo. 2d, cited by Selw.;) Specialties, where they are at the time of the creditors decease, (*Lum* vs. *Dodson*, cited in Selw. N. P.; *Byron* vs. *Byron*, Cro. Eliz. 472,) and simple contracts where the *debtor resides*; Carthew, 373; Salk. 37; Ld. Rayd. 562.

An attempt is also made to support this defence upon the rule of *lex loci contractus*. This rule in most cases is founded upon the supposed intent of the parties. Further than this it is a matter of comity merely, as no independant State is bound to execute, or be governed by, the laws of another. To apply the rule however to a case like the

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present, and permit the interferance of another State with subjects falling within our jurisdiction, would be an abandonment of our own sovreignty. All transactions taking place in New York, upon matters subject to their jurisdiction, if regular by their laws, would be properly regarded here. A judgement rendered there, if the parties and subject matter are within their jurisdiction, would be held conclusive; and even the act of a Sheriff executed there, would, under like circumstances be esteemed valid, if called in question here. But we should hardly concede to their Courts, the power of acting upon the title of our lands, or to their Sheriffs that of disposing of them at auction.

The judgement of the County Court is therefore affirmed.

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MOSES STRONG VS. WM. MCCONNEL, (In Error.)

If an Attorney be retained to argue a cause just as it is called for trial, and he agrees to argue it for $3, and charges his client accordingly for that term; and also argues the same cause, three subsequent terms, (the client being present, and no further agreement made for fees,) and charges his client $12 for each argument; it is a question of fact for the auditors to decide, whether $3 was to be a compensation for each argument, or only for the first.

A part payment of an account, barred by the Statute of Limitations, amounts to an admission by the defendant, that the account is unsettled, and removes the bar.

It is not error for Auditors to refuse to report the whole evidence, instead of the facts in the case.

This is a writ of Error, brought to correct proceedings had in an action on book, originally commenced before a single Magistrate, appealed to the County Court, who rendered a judgement to account, September Term, 1830, and appointed auditors, by whom the following special report of facts was made. "That they find a balance due from the defendant to the plaintiff of *fifty-four dollars and eighteen cents, to balance book accounts between them.* And said auditors further report, the accompanying account marked A. which is all the account exhibited to them; also a statement thereon shewing that part of the account which was allowed the plaintiff of each item charged. The remainder of said account was disallowed. And they further re-

port that it was proved to them on trial, *that the defendant employed the plaintiff as counsel just as the cause was coming on for trial, Sept. Term,* 1818, *and the plaintiff agreed* to assist Gen. Williams on that trial *with such* preparation as he had ,for three dollars, *and that there* was nothing further said between *the plaintiff and defendant* in relation to any after *services* of the plaintiff as counsel in the cause. It was further proved, that the plaintiff did afterwards act as counsel of the defendant in said cause, at the several terms in the plaintiffs' account, and that there were three jury trials of said cause after Sept. Term 1818, and that the plaintiff argued the cause of the defendant on said trials, and that the defendant was present at the trials. *The defendant also made* the Statute of limitations a part of his *defence*, to rebut which, it was made to *appear* to us that the defendant paid the plaintiff nine dollars of the plaintiff's account, Nov. 26, 1822. It appeared that the item of nine dollars credit was shown to the defendant a short time previous to the commencement of the suit, as well as the items of charge herewith reported, and that the defendant then appeared to assent, (or said) that the credit was right, and that it was admitted by the defendant that he had never paid the plaintiff any other sum on account, except said nine dollars, and that *the defendant contended* that at the time he paid it, it was all he owed the plaintiff. And said auditors further report that they were requested by the defendant to report the particular evidence upon which they relied in finding the facts above stated. But the auditors decided it was their duty to report the facts by them found in the case, and not the particular testimony on which they relied in making up their opinion.

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Strong vs. McConnel.

Accompanying Account Marked A.

William McConnel in account with Moses Strong, Dr.

1810, Nov. Term. To retaining and Term Fee, yourself vs. Mead, - - - - $4,00

Disallowed.

	Amount of Account	Allowed by Auditors.
1818, Sept. Term. To term fee and arguing you *vs.* Hall	$12,00	$3,00
1819, Sept. Term. To term fee and arguing you *vs.* Hall	12,00	10,00
1820, Jan. Term. To term fee in same case	4,00	4,00
1820, Sept. Term. To term fee in same case	4,00	4,00
1820, Dec. Term. To term fee and arguing same cause	12,00	10,00
1821, Jan. Term. To term fee in same cause	4,00	4,00
1822 Jan. Term. To term fee and arguing same cause	12,00	10,00
	$64,00	$45,00
Nov. 26, By Cash, $9,00	Deduct 9	
By Int. 3,24		
12,24		$36,00
Balance of Interest allowed,		18,18
		$54,18

To this report the defendant filed the following exceptions:

1st. For that the auditors report, that it was proved the defendant employed the plaintiff as counsel just as the cause was coming on for trial, Sept. Term, 1818; and the plaintiff agreed to assist Gen. Williams on the trial with such preparation as he had, for three dollars; and that there was nothing further said between the plaintiff and defendant in relation to any after services of the plaintiff as counsel in the cause. Also, that plaintiff afterwards aided as counsel for defendant, and argued his cause three terms, for which they have allowed the plaintiff ten dollars a term.

2d. For that the auditors were requested to report the facts found, by which it was made to appear to said auditors, that the defendant paid the plaintiff nine dollars of the plaintiff's account, Nov. 26, 1822. And the auditors refused

to report the facts or the nature of the evidence upon which they relied in coming to that result.

The report of the auditors was accepted by the Court, and judgement rendered thereon. Whereupon this writ of error was brought. So much of the record is presented, as, in connexion with what may be drawn from the opinion of the Court, is necessary for a full understanding of the case.

R. B. Bates, for defendant.—1st. In conformity to a general rule applicable to all such cases, Mr. Strong's charges ought to have been graduated in reference to his first representation and agreement.

And whether they should be so graduated is a question of law for the Court to decide. And is different from a mere estimation of the *value* of services upon which the Court would not disturb the finding of the auditors.

2d. It appears by the report that the parties attended and the auditors examined their account. No other witnesses were present.

The defendant contends that the plaintiff's testimony was inadmissible to prove the item of cash paid, or the time when it was paid; and, that the defendant's testimony as reported on this subject is not sufficient in law to authenticate the date of said item on the plaintiff's book, so that the whole account was not allowed.

3d. The defendant further contends that his admission of having paid the nine dollars, being accompanied with an assertion, that when he paid it he informed the plaintiff it was all he owed him and all he would pay, does not take the case out of the statute of limitations.

1st. Because to give it such effect it was necessary the account should have been mutual before the payment of this item. When the account is all on one side, the mere payment of part, does not constitute that mutuality of accounts referred to in the books.

2d. The most that can be implied from part payment is that the accounts have never been *settled*, whereas it is necessary that there should be a distinct admission of the debt to take the case out of the Statute. *Olcott* vs. *Scales*, 3 Vt. Rep. 173; *Bangs* vs. *Hall*, 2 Pickering Rep. 378.

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3d. The Statute goes upon the presumption of payment or settlement, or that nothing was originally due, arising from lapse of time. If however, this presumption is rebutted by an acknowledgement or payment of part, the law implies a new promise. Yet this new promise cannot be implied, when there is an express declaration of the party that he will pay no more, or that no more is due. *Bangs* vs. *Hall*, 2 Pickering, 378; 2 Saun. 127, note.

R. C. Royce, for plaintiff.—1st. The first question presented by the bill of exceptions, is whether the plaintiff was bound at the subsequent trials of said cause to argue the same for three dollars per term, as was stipulated for the first trial.

The original record shows that the defendant was present at each of said trials.

It is contended by the plaintiff, that the auditors were the sole judges of what would have been a reasonable compensation, and this they were bound to allow.

2d. The statue of limitation is also made a defence; the original writ bears date the 8th, and is served the 18th of Oct. 1828, and within six years of the date of the credit as proved before the auditors.

The auditors are the sole judges of the weight of evidence as has been decided by this Court, in numberless cases. This defence was made before them, and to obviate it, they state in their report, "it was made to appear to us that the defendant paid the plaintiff nine dollars of the plaintiff's account, Nov. 26, 1822.

It appears also, that the credit was shown as well as the debit side of the plaintiff's book, a short time before action, and the plaintiff "*assented*, or said the credit was right."

There is no pretence that improper evidence was admitted, and it does not appear that other evidence was adduced before the auditors; and it is wholly immaterial, if the exhibition of the account to him in the manner stated and his assent thereto, if proper in kind and sufficient in degree to satisfy the auditors, the defendant cannot legally have relief. And indeed it is contended the book alone in absence of any account of the defendant was sufficient, and

that a debt or credit would bring the case within the statute 2 Vt. Rep. *Hutchinson* vs. *Pratt*, (174.)

3d. It may be contended that the report shows the defendant contended *at the time* he paid the nine dollars, it was all he owed, and that this rebuts the legal inference of an acknowledgement of the debt.

It is not admitted that such could be the tendency of the evidence, if the report could justify such a construction. The language of the report is, "it was admitted by the defendant that he never had paid any other sum on account, except said nine dollars, and that the defendant contended that at the time he paid it, it was all he owed the plaintiff.

It does not appear that he contended or that there was the slightest evidence before the auditors, or that they intended to report, that *at the time* the nine dollars was paid the defendant contended this was all he owed, but it is merely, that he contended before the auditors he *did not owe any more when this payment was in fact made*.

4th. It is contended that the admission that no more was in fact paid, binds the defendant to pay what shall be found due. And it is difficult to distinguish this from the case of a note for $100, upon which the maker admits he paid a sum less than the amount of the note, (indorsed so as to bring the case within the statute,) and that he has paid no more than the sum indorsed and yet pleads the statute.—2 Starkie, 895; 4 M. & S. 361; 4 East. 599 *Bryan* vs. *Horseman*.

5th. There can be no error in the auditors refusing to report the particular evidence. It was not their duty to do so, and it has been so ruled by the Court.

The opinion of the Court delivered by

BAYLIES, J.—In this case a report of auditors in favor of the plaintiff and against the defendant was made to the County Court, and was accepted, and judgement was rendered thereon by said Court, to which the defendant excepts, and a full record of the proceedings in the action is brought here to be inspected by the Court, and for the correction of errors, if any there be.

1st. As the plaintiff was retained in the cause of the de

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fendant Hall, just as it was coming on for trial, September Term, 1818, it is possible, that three dollars was a full compensation for the services rendered at that term by the plaintiff "*with such preparattons as he had.*" And at subsequent terms of the Court, the plaintiff might, with *better preparations*, merit ten dollars for an argument. It was a question of fact for the auditors to decide, whether the three dollars, agreed upon, was to be a compensation for each argument, that the plaintiff might make; or was to be a compensation for only the first argument. The auditors have decided, that the three dollars was a compensation for the first argument; and have found for the plaintiff to recover ten dollars for each subsequent argument. I do not perceive that the auditors erred in making this decision, if the plaintiff's claims were not barred by the Statute of Limitations as the defendant contends.

2d. It appears from the record, that the plaintiff's last argument was at January Term 1822, and is the last item of charge on his book. It also appears, that the defendant paid to the plaintiff nine dollars towards his account, on the 26th November, 1822, and the same was credited. And it also appears, that the debt and credit of the plaintiff's account were showed to the defendant a short time before the commencement of this suit, and "the defendant said the credit was right, and *admitted* he had never paid the plaintiff any other sum on *account*, except said nine dollars." It also appears that the plaintiff's writ bears date the 8th, and was served on the 18th of October 1828. Hence I conclude, that the plaintiff's last item of charge was dated six years and eight months before the date of the plaintiff's writ, and the plaintiff's account was barred by the Statute of Limitations, when the writ issued, unless taken out of the Statute by defendant's paying nine dollars towards the account on the 26th Nov. 1822, which was 49 days short of six years when the writ issued. The defendant's admission, *that the credit was right, and he never paid the plaintiff any other sum on account, except said nine dollars*, tends to show, that the credit was not fictitious; but was given by the plaintiff according to the money he received of the defendant on the account. Here I would use the language of Lord *Kenyon, C. J.* in the case of *the*

Executors of Tuthill vs. *Spaulding et al.* 6 T. R. 189. He says "it is not doubted, but that a promise, or acknowledgment within 6 years will take the case out of the Statute; and the only question is, whether there is not evidence of an acknowledgment in the present case.—Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item of credit in an account, given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act, which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the Statue. Daily experience teaches us, that if this rule be now overturned, it will lead to infinite injustice." "A part payment of the demand, clearly revives the debtor's liability as to the remainder. But to obviate the effect of the Statute, it is not necessary that the debtor should make a new promise to pay the money. It is sufficient that he *recognizes*, or admits the *existence* of the debt, although, so far from making a promise to pay it, he, at the same time, disputes his liability, and asserts, that he never will satisfy the claim, as it did not arise within six years." Chit. on Contracts, 317, and cases there referred to.

In view of the above principles of law, it was for the auditors to find, whether the defendant by paying a part of the plaintiff's account, did not admit, that there was an open unsettled account between them, and take the case out of the Statute of Limitations. I have no doubt, but part payment of the account revived the defendant's liability, as to the remainder. If the defendant ever *contended* that at the time he paid it (the $9,) it was *all* he owed the plaintiff" it would not affect the defendant's liability, so long as there was no evidence in the case, tending to prove his assertion to be true.

3d. If either party thinks the evidence laid before the auditors for them to find a particular fact is illegal, or inadmissible, such party may request the auditors to report such evidence, and the objections to it; and if the auditors neglect, or refuse to make such report, it would be er-

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ror. But in this case the auditors were not requested to report the evidence of a particular fact, because it was illegal or inadmissible; but to report the whole evidence in the case instead of the facts. This the auditors refused to do and it was not error.

The judgement of the County Court is affirmed.

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PENNIMAN & al vs. LYMAN PATCHIN.

An attorney having a demand in his hands for collection is not authorised to assign it to a third person so as to bind his client. If he do assign it and the assignee receive the money, assumpsit for money had and received lies in favor of the client against the assignee.

There is in such case a *privity* between the parties, and the law implies a promise. In such a case the declarations of the defendant at the time of receiving the money are not admissible in his favor.

Nor is the original debtor a competent witness for the plaintiff to prove the payment to the defendant without a discharge.

Cases brought up to the Supreme Court by exceptions are treated as upon writ of Error.

This is an action of assumpsit for *money had and received*.—Plea, Non Assumpsit.

On the trial of the issue the plaintiffs claimed to recover of the defendant a certain sum of money which was found due to them from Thomas Brownell by an award of arbitrators made on the 16th day of November 1830, which had been assigned to the defendant by one Daniel Church, and which had been paid to the defendant by said Thomas Brownell. The said award together with the assignment of the said Church on which was the receipt of the defendant, were read in evidence to to the Jury and are as follows.

Whereas there are several accounts depending and divers controversies and disputes having arisen between Daniel Church of Bennington and Thomas Brownell of Pownal, both of the County of Bennington and State of Vermont, concerning their Book Accounts, and also a suit in Chancery brought by the said Daniel in favor of T. J. Penniman & al. against said Brownell on a mortgage

and notes, given by Alson Squires to Solomon Wright, jr. and for putting an end to said disputes, the parties have entered into an agreement in writing, bearing date Sept. 14th, 1830, to refer the said disputes to the undersigned arbitrators. Now know ye that having duly examined the proofs and allegations of both the said parties—do make out this as our award between said parties in manner following, that is to say, that all further prosecutions between said parties shall cease and be no longer continued; and we do also award and order that the said Thomas Brownell shall pay or cause to be paid to the said Daniel Church the sum of one hundred and fifty-nine dollars and sixty-nine cents, to balance their book accounts, and we do hereby further award and order that the said Thomas Brownel shall pay or cause to be paid, for the said T. J. Penniman and Parmalee, to the said Danl. Church, the further sum of one hundred and one dollars and eighty-five cents as a balance due him on the aforesaid suit in Chancery; and we do also further award that the said Thos. Brownell defray the cost of this arbitration, taxed at ten dollars.

WILLIAM HENRY
BUCKLEY SQUIRES,
JOHN NORTON. } *Arbitrators.*

Bennington, Nov. 6, 1830.

Bennington, 24th Nov. 1830.

I hereby, for value received, assign and transfer to Lyman Patchin the within awards, and authorize him to collect the same as I could or might personally collect the same.

DANIEL CHURCH.

December 3d. 1830.

Received in full of Capt. Thomas Brownell of the within award.

L. PATCHIN.

The plaintiff then offered the said Thomas Brownell as a witness to prove that he paid to the defendant the money claimed by the plaintiffs. To the admission of which testimony the defendant objected on the ground that the said Thomas Brownell was interested in the event of the suit,

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he being the person who owed the money claimed by the plaintiffs, to the plaintiffs, and who paid it to the defenant without any authority from the plaintiffs and not for the use of the plaintiffs. But the Court overruled the objection and admitted the witness who testified to the jury as above stated.

The defendant offered to prove by Blackman E. Brownell the conversation which took place between Lyman Patchin and Thomas Brownell at the time the bargain was made between them respecting the above mentioned money, to show that Lyman Patchin was an agent for Thomas Brownel, in receiving said money. To the admission of which testimony so far as it regarded what was said by Lyman Patchin at that time, the plaintiff objected and the testimony was rejected by the Court. But the said Blackman testified that he paid the money on account of his father, Thomas Brownell, to the defendant, that the defendant executed the receipt and delivered up to him the award and assignment; and the assignment and receipt were then on the award as they now are.

The Court charged the jury that an attorney employed to manage a suit or collect a bebt as such, and by virtue of his authority as such attorney only, could not sell or transfer a note or demand belonging to his client, in any manner whatever, and the jury returned a verdict for the plaintiffs. To which decisions of the Court and charge to the jury the defendant excepted. The exception was allowed, and the case passed to the Supreme Court.

Blackman, for defendant.—1st. It is contended by the defendant that Thomas Brownel was interested in the event of this suit, because, 1st. If the plaintiffs recover this debt of the defendant, it will clear Brownel from all responsibility to the plaintiffs, and there can be no doubt but that Brownel would be still liable to plaintiffs, if he paid the money to the defendant without any authority from the plaintiffs.

2d. If Brownel had any authority from the plaintiffs it was from Church, their agent and attorney, and if he could authorize Brownell to pay it to Patchin, and Patchin to receive it, could he not also authorise Patchin to pay it to

himself; and could he not as attorney receive it and discharge Brownel and Patchin from all liability to the plaintiffs? If he could not, Brownel would still be liable to plaintiffs, and Patchin to Brownel.

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2d. The declarations of Patchin, at the time he made the contract with Brownel, that he was the agent of Brownel, ought to have been admitted, as it was a fact connected with the matter in dispute and did not affect the plaintiffs in any manner, only as the actual existence of the fact affected the nature of the transaction itself, and as a mere fact and part of the *res gestæ* it ought to have been admitted. 1 Starkies Ev. 52. If Patchin acted as the agent of Brownel, he would be accountable to him for his acts, and to no other person; and the plaintiffs could not maintain an action against him. And if the plaintiffs, attempt to make Patchin liable on a transaction which took place between himself, then why not show the whole that took place at that time, which cannot be done unless we are permitted to prove what Patchin said. If money be paid toan agent for the use of his principal, the agent who has paid it over is not liable to an action. 2 Starkies Ev. 113.

3d. There was no privity of contract between the plaintiffs and defendant, as the defendant did not receive the money to plaintiffs use, but to his own use. 2 Starkies Ev. 106. If there was any contract on the part of Patchin to pay this, it was an implied one, and implied too against his express dissent, which would not constitute such privity between the parties as would be necessary to make the defendant liable to the plaintiffs. 14 East. 595, *Williams* vs. *Everett;* 1 Chit. Plead. 305; 3 Vt. Rep. 144, *Burnap* vs. *Partridge.* It is in fact, assigning a right of an action belonging to Brownel, (if there was any right of action any where) to plaintiffs, which is not authorised by the Laws of this State.

4th. The Court charged the jury, that an attorney as such had no authority to sell or transfer a demand belonging to his client. Admitting this to be correct in certain cases, still as the plaintiffs reside and have resided out of this State during all the time this demand was in the hands

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of Mr. Church, which was ten or eleven years, that they had suffered him to make any disposition of it he pleased, by changing the security as he pleased and finally submitting it to arbitration, it is conceived that any person would suppose that Church was authorised to sell it in any manner he should think best.

Bennet & Aikin, for plaintiffs.—1st. The charge of the Court was correct. An attorney at law, is the special agent of his client, employed for specific purposes and consequently clothed with specific and limited powers. The purpose of his employment is to collect the debt of his client according to the customary and established course of judicial proceedings; and his powers are restricted to to the proper execution of this purpose. 7 Cranch, 436, He cannot compromise his clients debt.

He cannot make his clients bailiffs to their debtor, by receiving securities to collect, and thereby, render them liable to an action of account. 18 Mass. R. 319.

He cannot enter a retraxit on the record, for that is a perpetual bar. Beachers case, 8 Coke. 58.

He cannot discharge the debtor from custody on execution without satisfaction. 10 John. R. 220.

Having prosecuted the suit to final judgement, he cannot discharge the debtor for a less sum than that recovered. 18 Mass. R. 347; 8 John. R. 361.

The powers claimed for attornies in the present case, would in the language of Chief Justice Kent, be enormous and dangerous to clients.

2d. The next question we shall consider arises on the decision of the Court admitting Brownel to testify.

Church having been the attorney of the plaintiffs for the collection of this debt, and that fact being known to Brownell, he would be justified in treating him as such attorney, while the papers should remain in his hands, or until notified that his authority had been countermanded by the creditors. In the present case no evidence was given of notice of such countermand. He would therefore be justified in paying to Church or his order, provided he paid in good faith, as he undoubtedly did in the present case. This payment to a plaintiffs late attorney, who has been re-

moved by the party but without order of Court has been held good. 1 Blk. 8.

But if this is not so, the fact to which Brownel testified was abundantly made out by other proof, viz. the receipt of the defendant himself on the award, and the testimony of Blackman E. Brownel, the defendant's own witness, and no contradictory evidence was given or offered. 6 Bac. Ab. 659; 3 East. 451; 1 Cains R. 157; Same, 160.

If the witness had been rejected, the verdict must therefore have been the same. Under such circumstancess a new trial will never be granted. 2 Cain. 129; 2 Stark. Ev. 758.

3d. In regard to the remaining point, it is a sufficient answer to say, that the Bill of exceptions discloses nothing. It merely states that the defendant offered to prove the conversation that took place between Lyman Patchin and Thomas Brownel, at the time the bargain was made between them, respecting the above mentioned money, to show that Patchin was agent of Church, without stating what the conversation was. It not appearing what the evidence offered was, if any was offered, it is impossible for this Court to say that the County Court erred in rejecting it; for it cannot appear that it had any tendency to prove the fact to establish which it was offered. 1 Aikens Rep. 210; 2 Aikens Rep. 26.

But let it be supposed that the offer of the defendant was to prove that Patchin stated at the time refered to and Brownel conceded that he, Patchin, was acting as the agent of Church; still the evidence would be inadmissible.

For, First, the statements of Brownel could not be evidence; he himself is a witness.

Secondly, it is *res inter alios acta*, and therefore inadmissible.

Thirdly, it contravenes the general rule, that the declarations of a party not assented to by the adverse party, are not evidence in favor of him who makes them.

The opinion of the Court was delivered by

Phelps, J.—This is an action of Assumpsit, to recover a sum of money, paid by one T. Brownel to the defendant,

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under the following circumstances. One D. Church, having in his hands as an attorney, for collection, a demand in favor of the plaintiffs, against Brownel, and some dispute having arisen respecting it, Church (as it would seem, by consent, or with the approbation of the plaintiffs,) submitted the matter to arbitration. The arbitrators awarded, among other matters, "that said Brownel pay to said Church, for the said Penniman & Parmalee the sum of $101,85, as a balance due" on the aforesaid demand. This demand arising on this award, was afterwards assigned by Church to the defendant, and the amount paid to the defendant by Brownel.

It is admitted that the money in question was the property of the plaintiffs; but various reasons are urged why the plaintiffs should not recover of the defendant in this action.

And first, it is insisted that the assignment by Church, was effectual to pass the property to the defendant, and that the plaintiffs' only remedy is against Church.

We think otherwise. An attorney is a special agent.—His powers are limited to the purpose of his employment, and are such and such only, as are necessary for the accomplishment of that purpose. He may take all necessary measures, for the recovery of the demand, obtain judgment, receive the money, and, upon such receipt, give discharges; but he is not authorised to make any disposition of the demand, or exercise any authority over it, which is not necessarily involved in the discharge of his duty. Hence he can not compromise a demand, without special authority for that purpose, nor discharge it without satisfaction. Much less can he assign it for his own benefit; such an act being not only foreign to the purpose of his employment, but inconsistent with it. A power so liable to abuse (which indeed could hardly be exercised without abuse) can, with no propriety, be admitted. We are all agreed therefore, that the assignment of Church does not authorise the defendant to retain the money.

It is further urged that there is no privity between these parties, and that the law will not imply a promise against the express dissent of the party.

This position is untrue in both particulars. There was

certainly a privity between the plaintiffs and Church, in relation to this business, he being their mere agent in the transaction; and if he delegates to the defendant his authority to receive the money, which he certainly might do, there is the same privity between the plaintiffs and defendant. The circumstance that Church attempted to confer a greater authority than he possessed, does not vary the case. There is a privity between all these parties, as between the principal, the agent, and the sub-agent. If C. had received it, he would have been accountable to the plaintiffs, and if another receives it by his direction, that other receives it, by an authority delegated in the first instance by the plaintiffs, although transmitted through C, and the accountability continues. The difficulty consists in this, that C. could impart to the defendant no right to retain the money as against the plaintiffs. The authority to receive it he might impart, and this renders the defendant so far as concerns the reception of the money, the agent of the plaintiffs.

Supposing, however, this view of the subject to be incorrect, what is the result? Simply an attempt, on the part of the defendant, to appropriate the money of the plaintiffs to his own use. The award itself shewed to whom the money belonged, and, if the purpose of the defendant was to withhold it from the plaintiffs, that purpose can be accounted for, only upon some supposed sinister design. In this point of view the act was tortious. And the law does in many cases imply a promise, against the express dissent of the party. It does so in all cases, where the money of another has been obtained under circumstances of fraud or circumvention, and where, in equity and good conscience, it cannot be retained. I use the terms in the sense in which they are used in the books, and with reference to the numerous cases, where this action is wielded to the great purposes of justice. See 2 Starkies Ev. 109, & cases there cited.

The case of *Williams* vs. *Everett*, 14 East. 144, has been relied on by the defendant. It bears however no analogy to this. In that case, the money was not received by virtue of any authority, supposed or pretended, from the plaintiff. It was remitted with a view to some negociation, to

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be entered into by the defendant E. with the plaintiff W., in relation to the debt due from the person remitting it.—The defendant declined the commission; and there was no ground for holding the money, in that case, to be the money of the plaintiff. In this case, the money was paid to the defendant by direction of the plaintiffs' attorney, and that, under circumstances which discharged the claim against Brownel. Had this been the fact in the case of *Williams* vs. *Everett*, the result would have been different. It is also insisted, that the declarations of the defendant, at the time of receiving the money from Brownel were improperly rejected at the trial. What the tenor of those declarations was, we are not informed. It was incumbent upon the party excepting, to show enough of their character to enable this Court to judge of their relevancy. But if the object was to show generally, that the defendant acted as the agent of Brownel, it is very certain that they could not be admissible. He had taken an assignment of the debt against Brownel, had received the amount, and discharged the debt. How is it possible then, that any declarations of his could have made him the agent of Brownel? The idea of such an agency is inconsistent with the whole transaction. And the inconsistency of his declarations with the written evidence, was a sufficient reason for their rejection.

The only remaining point in the case, is the question as to the competency of Brownel. It is very clear that a recovery in this case would forever quiet him as to this demand. The facts stated in the case, if followed by a recovery in this action, would show an actual satisfaction to the plaintiffs. And in a future action against the witness, this recovery might be used as evidence, not only of that fact, but also of their adopting the payment made to the defendant. There is no doubt then, if a recovery is had here, upon the testimony of the witness, he is forever discharged. The County Court went probably upon the ground he was discharged at all events by the payment of the debt, either to Church, or the defendant. The fact being proved, it would probably be so; but the fallacy of the argument is, that he was called to prove this fact, and by his testimony, in this case, to establish that defence.—

If that fact were not proved, in this case, he is *prima facie* liable; and whether, on another occasion, he could prove it by other evidence, is not for us to determine. It is enough for us that he is called to prove a fact which creates a perpetual bar in his favor, and without that fact he is liable still.

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The testimony of this witness was probably unnecessary, and why he should have been pressed upon the Court as a witness, after the defendant's receipt was in evidence, it is difficult to imagine. And were this to be regarded as a motion for a new trial merely, resting in the discretion of the Court, we should hesitate before granting a new trial, on account of testimony, which probably did neither good nor hurt. But a case brought here upon exceptions, stands as upon a writ of error. We can merely reverse or affirm the judgement, and if error has intervened, we have no discretion; nor can we look farther into the merits of the case, than they are disclosed of record.

On the last point therefore, the judgement of the County Court is reversed, and the cause remanded.

ABIGAIL BLACKMER vs. Adm'r of SAM'L BLACKMER, deceas'd.

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That claims, carried before Commissioners of a deceased person's estate, must be settled as if all were done on the day of the decease.

That Commissioners must allow upon an annuity bond only what is due at the decease of the obligor. All after that is contingent, and, if it does fall due, may be prosecuted against the heirs, who may have assets fall to them.

That, if there be a bond in the penal sum of $1000, conditioned to pay $100 a year during the life of the grantee, the punctual payment of the first ten sums of $100 each, is no bar to a further pursuit of the bond, while the grantee lives.

A suit was commenced upon a bond of $1000, conditioned for the payment of $100 annually during the life of said Abigail. The ten first payments were punctually made and endorsed. Afterwards payments were refused, and a suit was commenced. The obligor died, and the suit was discontinued, and the claim carried before Commissioners. An appeal was taken from their decision to the County Court. There the cause was decided upon the following case, agreed to by the parties.

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It is agreed, that Samuel Blackmer, the obligor, died March 13, 1831.—That the estate was duly represented insolvent.—That the inventory of the whole estate, real and personal, was 4568 dollars and 61 cents, which is subject to the widow's dower.—That the amount of debts against the estate, allowed by Commissioners, was 2770 dollars and 77 cents, not including the plaintiff's claim; and that there is a further debt against the estate, secured by mortgage, of about 200 dollars.—And that the sum allowed by the Commissioners, in favor of the estate, was 72 dollars 39 cents, which is the whole sum due the estate from all persons.

Upon the foregoing facts, the Court are to render judgement for such sum in damages as they shall think the plaintiff entitled to recover—hearing, on the trial, testimony as to the value of the annuity, if they shall adjudge such testimony admissible.—Either party being at liberty to except to the opinion of the Court, and to carry the case to the Supreme Court for revision.

On the hearing of this case, the Court rendered judgement for the plaintiff for the sum of $457,76. Of this sum, $272,94, was for the instalments due previous to the time of the death of Samuel Blackmer, March 13th, 1831, and the sum of $184,82 was the estimated value of the annuity thereafterwards to grow due. The defendant objected to the admission of testimony as to the value of the annuity; but the Court admitted the testimony, and assessed the value of the annuity at $184,82 as aforesaid. To these decisions of the Court the defendant excepts, and prays that the case pass to the Supreme Court for their revision.

Argument for the Administrator.—I. As a general rule, in debt on a bond, the judgement cannot be carried beyond the penalty; and the reason is, because the plaintiff has chosen her security, and there is no equity, that the Court should better her security for her.—Francis' Maxims, 4, 93.—1 Saunders, 58, *Gainsford* vs. *Griffith*, note a.—2 Wm. Blackstone's Rep. 1190, *Brangwin* vs. *Perrot*.—6 Term Rep. 303, *Wilde* vs. *Clarkson*.—Doug. Rep. 49, *White* vs. *Sealy et al.*—1 John. Rep. 343, *The people* vs. *Gaine*.

But, when the obligor comes into Court to be relieved against the penalty of a bond, the debt may be carried beyond the penalty; for, if he would have equity, he must do equity; and, therefore, interest may be allowed beyond the penalty of the bond.—Francis' Maxims, 4, 93.—1 Vt. Rep. 266, *Williams & Clark* vs. *Wilson & Leonard*.—1 East. Rep. 436, *McClure* vs. *Dunkin*.—Newland on Con. 335.—1 Poth. 183–4.

The penalty extends to the utmost that can ever be recovered for all and every of the breaches.—3 Bur. Rep. 1352, *Bird* vs. *Randall*.

Equity will consider sums of money, paid under a contract with a penalty, to be paid in part of it, and will not give relief beyond the reduced amount of such penalty.—Newland on Con. 332.

In the account of assets, a bond is never rated higher than the penalty is: it might injure creditors.—5 Vesey, 329, *Mackworth* vs. *Thomas*.

It appears from the bond and endorsements thereon, that the amount of the penalty had been paid in full before the commencement of this suit. If nothing had been paid before a suit, there is no doubt but that, after a judgement for the penalty, and the same money paid by the obligor, which has been now paid, he would have been discharged from all liability on the bond. If this doctrine be correct, the man, who does not pay any thing upon a bond until he is sued, will have to pay it but once. But, if he pays the amount of it without a suit, he may be compelled to pay the whole amount of the bond twice.

II. Where there is no subsisting debt or duty, or where the claim, if payable or to be satisfied at a future day, vests in contingency, and it is uncertain whether any demand will accrue, or not, the claim cannot be allowed.—2 Aikens' Rep. 56, *Jones* vs. *Cooper*.

A contingent security, if the contingency has not taken place, cannot be pleaded in bar to an action.—2 Aikens' Rep. 56, *Jones* vs. *Cooper*.—Cro Car. 363, *Goldsmith* vs. *Snyder*.

A similar principle prevails in the proof of claims under commissions of bankruptcy.

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Debts not due at the date of the Commission of Bankruptcy, are not proveable.—Ham. Chan. Dig. 94.

Debts depending on a contingency, which has not taken place at the date of the Commission of Bankruptcy, cannot be proved.—Ham. Chan. Dig. 94.—2 P. Wms. 395.—Ex-parte East India Company.

A debt cannot be proved under a Commission of Bankruptcy, unless it be due and owing, and payable at all events.—3 Wils. Rep. 271, *Goddard* vs. *Vanderheyden*.—3 Term Rep. 435, *Hancock et al.* vs. *Entwisle et al.*—2 Stra. 1160.

It is essential to a claim allowable by Commissioners, that it be absolute, and that it do not depend on a contingency, which may never happen.—2 Aikens, 56.— 1 D. Chip. Rep. 164, *Selectmen of St. Albans* vs. *Curtis et al.*—Same, 230.

Growing payments of an annuity cannot be proved.—10 Vesey, 349—Exparte Granger.

Payments of an annuity not due, depend upon a contingency.—10 Vesey, 349—Exparte Granger.

And the rule to decide, whether a debt due from a bankrupt accrued before the bankruptcy or since, is, to consider whether the creditor could have enforced payment before the bankruptcy.—Ham. Chan. Dig. 94.—1 Term Rep. 369, *The King* vs. *Egginton*.—2 Aikens' Rep. 56, *Jones* vs. *Cooper*.

III. Where a bond, conditioned to do a single act, is forfeited, the whole amount becomes due, which is the reason that it may be proved under a Commission of Bankruptcy; but where a bond is conditioned to pay by instalments, or to do several acts at different times, and the condition is not kept by payment of one instalment, and the penalty consequently is forfeited, a judgement is rendered for the whole penalty, to stand as a security for future breaches, but the bond is not really forfeited for any thing more than for the instalments then due.

The cases where annuity bonds have been valued, are where covenant has been brought, and not debt, on the bond.

The plaintiff has not declared for the value of the annu-

ity, but for instalments for several years, which have not become due, and may never become due. Can she recover them in an action of debt on the bond? Could she recover them if the obligor were alive? Does the death of the obligor give the plaintiff any right, which she would not have had, if he had lived?

The plaintiff contends, 1st, That that part of the judgement of the County Court, that relates to the instalments, which, according to the terms of this bond, were in arrear at the *time of the death of the intestate*, was correct. The question, as to his liability for such instalments, has already been decided by this Court, in a previous suit upon this bond.

2d, That evidence, *as to the value of the annuity*, was properly admitted, and that judgement for the plaintiff to recover such value, was correct.

1st. According to the decision of this Court in the former suit, the intestate, had he lived, would *himself* have been liable for all future instalments, which might grow due, if they, together with the arrears, did not exceed the amount of the penalty.

2d, Though the obligor is dead, yet if there were no statute relating to insolvent estates, the administrator, or heirs, would be liable, so far as they had assets, for all instalments thus growing due.—Bac. Abr. Title Ex'rs & Ad'rs p. 1, and cases there cited.—*Jones* vs. *Cooper*, 2 Aik. R. 54. 1 Swift. Dig. 448.—2 Bl. Com. 340.

3d. By the statute, demands against insolvent estates, *though payable at a future day*, are to be allowed by the Commissioners.—Vt. Stat. p. 358, Sec. 92.

4th. The mere uncertainty of the sum claimed, constitutes no objection to its being allowed, if it be a demand *in presenti*.—*Jones* vs. *Cooper*, 2 Aik. R. 54.

This is a demand *in presenti*. For,

1st, There is a manifest distinction, it is concluded, between the case, where the event would *create* the claim, if it should happen, and that where it must happen to *defeat* the claim. In the former case (which is that of *Jones* vs. *Cooper*, *ubi sup.)* no demand could *arise*, if an uncertain event did not happen; but here, if the existing state of

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things, to wit, the life of the plaintiff continues, (which is a natural presumption.—2 Stark. 1252) future instalments will continue to grow due.

The distinction is still more apparent, if it be true, that, in case of the plaintiff's death, this annuity can be apportioned.—2 Wm. Bl. 1016.

2d, The penalty of the bond is a demand *in presenti*; the condition only suspends it.—Per. Ld. Ch. Hardwicke, 1 Atk. 113, and the condition being broken, the claim should have been allowed.

5th, The defendant cannot be relieved from paying the penalty of the bond, which has become forfeited, but by paying what the plaintiff is in conscience entitled to.—2 Aik. 54.

In cases of bankruptcy, see *Hancock* vs. *Entwisle et al.* 3 Term R. 435, (2 Wm's Abr. 270.)—*Hodgson* vs. *Bell*, 7 Term. R. 97, (2 Wm's Abr. 251.)—Exparte *Grovenor* and *Winchester*, 1 Atk. 115. So in case of *annuity bonds*, *Perkins* vs. *Kempland*, 2 Wm. Bl. 1106.—Exparte Le Compte, 1 Atk. 251.—Exparte Bettou ib. 252.

If the plaintiff should not be allowed to recover for instalments to grow due after the death of the obligor, it would be a greater hardship upon her than would have been the above cited cases upon the creditors, had it been there decided, that the demands were not proveable under a Commission of Bankruptcy; for, in these cases, if such had been the decision, the certificate of bankruptcy would have been no bar to an action, wherever the contingencies did happen. *Here*, if the estate is insolvent, the claim of the plaintiff, if not allowed, must forever sleep, though she live a century.

The reason of the above decision does not fail now that *Courts of Law* have equitable jurisdiction to relieve from penalties.

Many of the above decisions have been made *since the Stat.* 8 & 9 *Wm.* 3*d*, of which ours (see p. 88, § 99) is a transcript.

HUTCHINSON, C. J.—Pronounced the opinion of the Court. One part of this case is put at rest, by the decis-

ion of this Court in a former suit upon this bond. The only question, litigated in that suit two years ago, was, whether the ten payments of $100 each, indorsed as they fell due from year to year, and amounting in the whole to the penalty of the bond, was a bar to any suit for after payment, falling due in the life time of the grantee, the present plaintiff? This Court decided, that those payments were not a bar to the suit then pending. As that opinion was not pronounced, till the year following, and the obligor died in the mean time, and the claim was laid before the Commissioners pursuant to the statute in such case provided, the decision of this Court did not entitle the plaintiff to execution. That the decision, however, was made upon so full consideration, we are disposed to observe it as good authority on the same question now before us. Neither has any thing new been presented, which tends to create any doubt of the correctness of that decision. This necessarily leads to the affirmance of the judgement of the County Court, so far as relates to the sum of $272,94, due at the decease of the obligor.

The next question regards the valuing the annuity. The County Court admitted the evidence, though objected to, and allowed $184,82, as the value of the annuity, that remained after the decease of the obligor. While investigating this question, we must bear in mind, that this claim is urged against the estate of the deceased obligor, whose estate was represented insolvent; and that this claim was laid before the commissioners of claims upon his estate, and comes by appeal from their decision to the County Court, and by exceptions from the County Court to this Court, as by a writ of error. With regard to the law upon this point, (and there is now no dispute about facts) we must decide just as the commissioners ought to have decided. Just as we should decide, were we sitting as commissioners upon the estate of the obligor. This Court has, several times, decided, that commissioners must always decide the claims, laid before them, as they existed on the day of the decease of the person, on whose estate they act. No after circumstance should be brought in to affect their decision. All debts, existing at the time of the decease, whether become payable or not, must be al-

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lowed. What is not then a debt, must not be allowed by reason of any prospect of its becoming so at a future day. A covenant of warranty in a deed is not considered a debt, till the covenant is broken. If the law were otherwise, it would do great injustice to the creditors, whose debts ought to be paid as far as the property extends. It would serve to lock up the property from such creditors, to await the breach of some covenant or covenants, that may never be broken; and wholly prevent a final settlement of the estate. Persons, who hold such covenants, must bear the risk of finding, after they are broken, and a cause of action exists, heirs, who have received assets from their ancestor, the covenantor. They can have no other remedy.

A bond, conditioned to pay monies or perform services at future periods, that are certain to arrive, is a debt *in presenti*, to the amount of what is required by the condition to be paid or performed. In all such cases, the sum due, or that will fall due, in equity, is considered the debt, if it do not exceed the penalty. After the modern statutary provisions for courts of law to chancer bonds, and give judgement for only the sum due in equity, upon the matters, named in the condition, the penalty is considered as merely a security, and mean of collecting, the sum due by the condition.

Now, transferring ourselves back to the day of the decease of the obligor, and how do we find this claim for any thing not already due? Is it certain, that it ever will become due? It depends wholly upon the continued life of the obligee; and upon her living, too, to the end of a year, when a payment would become due, according to some authorities. At the decease of the obligor, this claim had no existence. The plaintiff might live so as to have a debt accrue; she might die the next day, in which case it never would accrue.

Annuities have not been much in vogue in this state.—And our statute, for the distribution of the estates of persons deceased, contains no provision that can vary this from other contingent cases. The statute provides for two classes of cases. One class is composed of those claims, that can be fairly called existing debts at the time of the decease, whether they be then due and payable, or

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will certainly become so at some future day. All these stand good against the estate, and come in for payment, or a dividend. The other class is composed of such as are not then existing debts, but may or may not, become existing debts at some future day, and upon the happening of some uncertain event. These, if they ever become debts, must not prevent settling the estate of the deceased, while that event is happening; but must afterwards find assets in the hands of some heir; or remain unsatisfied. The plaintiff must share with the other creditors in collecting the sum due at the decease of the obligor. Any thing further cannot be allowed her in this action.— The judgement of the County Court is reversed with regard to the sum of $184,82, which had not accrued at the decease of the obligor. And is affirmed with regard to the remaining sum. The Clerk must certify this decision to the Court of Probate.

Southworth, for plaintiff.

Blackmer, for defendant.

LEACH & WALKER VS. WALTER J. SHEPARD.

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That a charge of 2088 pounds of wool may be recovered in an action on book account, if sold and delivered, and the object of the action is to recover the just value of the wool.

That, when a report of auditors, is set aside by reason of their neglect to report copies of the account of the parties, and the cause is recommitted to the same auditors, their refusing to go into evidence upon the whole merits, furnishes no reason for rejecting their report a second time.

That the auditors may hear new matter on recommitment of their report, and ought to do so in a case where justice plainly requires it; as where evidence is adduced, not before in the power of the party.

This cause came up from the County Court on exceptions to their decision on the reports of auditors. In their first report, the auditors find a balance in favor of the plaintiffs of $369,18. Their report so far as relates to any point now litigated, proceeds as follows.

"And the auditors further report, that, about the 26th day of December 1825, the plaintiffs, having the quantity of wool, mentioned in their account, proposed to sell the same to the defendant, and various proposals were made

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concerning it, by both parties. At length they agreed that the defendant should buy the wool of the plaintiffs; and the same was delivered to him. There were terms made, and an election given to the plaintiffs, but, whether the plaintiffs were to receive fifty cents per pound for the wool, or had the liberty to choose, if they thought fit to take a certain risk of the market price, or were to choose between fifty cents per pound and a certain risk of the market price, is *uncertain*. But the election, whatever it was, was to have been made by the plaintiffs at the time of delivery; which was a few days after the sale. The wool was delivered to the defendant at the time agreed on, but no election of any kind was made.

The plaintiffs charged the wool, amounting to 2088 lbs. on book, soon after the delivery, having minuted it on a slip of paper, at the time of delivery. The defendant transported the wool to Boston, where it was sold by his direction. And, it being uncertain what the terms of sale were, so far as the price was concerned, as above stated, the auditors regard it as a sale without any price agreed upon; and have therefore allowed what they found the wool to be worth."

On trial of the foregoing case before the auditors, the defendant objected to the plaintiffs' testifying, and contended, that the action on book, would not lie. The auditors overruled the objection, and decided that the action would lie, and proceeded to take the testimony of the parties, as stated in the foregoing report.

The defendant filed sundry exceptions to this report, in the County Court; and, on one of them, to wit, that the auditors had not returned a copy of the defendants account, the report was recommitted to the same auditors. At a subsequent term they made the following report, to wit:

"In pursuance of the foregoing rule, and having notified the parties to meet at the place fixed, in the foregoing notice, and they being present, by themselves and counsel the defendant exhibited the account hereunto annexed, against the plaintiff; which is a transcript of the same account, exhibited by him, and passed upon by us, on the former hearing before us; and desired of us, that the cause should be opened for a rehearing on the merits; and we

declined so doing. We further report, that the items of the defendants account, hereunto annexed, marked A. were allowed by us; and the items marked B. were disallowed by us, on the full hearing of the cause. We further report, that the amount of our report, as the balance due the plaintiff, ought to be reduced twenty dollars and one cent; there having been a mistake in the computation of that *sum*. We further report, that on hearing, it appeared, that the charge of the wool was made in fact on the private book of said Walker, as an account due the plaintiff."

The defendant filed exceptions to this supplemental report, also; and the County Court affirmed the report, and rendered judgement for the plaintiff. The exceptions to both reports sufficiently appear in the argument of counsel, and the opinion of the Court.

Argument for defendant.—On the part of the defendant, it is insisted, that, from the facts stated in the report, the book action cannot be sustained.

The general rule, that this action lies for goods sold, services rendered, &c., *in the ordinary course of business*; does not reach this case. Sw. Dig. 583.

The report shows *manifestly*, nothing more than a claim for *damages for a breach of a special undertaking*.

The right to charge on book, did not exist at the time of delivery; because the agreement was then subject to a contingency. Sw. Dig. 583; 1 Aiken. Rep. 74, *Slason* vs. *Davis*.

From all the facts, it is manifest, that this action has been resorted to for the purpose of making the plaintiffs witnesses. Sw. Dig. 528, 583.

Although the book action has been extended in this State, manifestly further than in any other, it is believed, the present case claims an indulgence for the plaintiffs, which no adjudication will warrant, and obviously without the letter or spirit of our statute.

Again. The auditors expressly say, there were *terms and conditions* to the contract; that the plaintiffs probably agreed to take a risk in the market. And, because the creditors are unable to determine with certainty what the conditions were, they conclude to call *it* what they ex-

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pressly say it was not; "*that is*" a sale for what it was worth.

The facts found are perfectly consistent with the truth, that the defendant was the mere agent of the plaintiffs.

Wherever damages are claimed for breach of a special undertaking, the suit must be predicated upon such special agreement.

2d. Could this action be maintained, it is believed, this report should be rejected. This case was returned to the auditors, April Term 1830, by order of the County Court; but for what purpose does not appear from the order, or from the rule, or notice. Nor does it appear when, or where, nor to whom they were to report. It is believed, the auditors mistook their duty in refusing to hear the case on its merits, when the defendant appeared for that purpose.

Our statute contemplates but one purpose for which cases are sent to auditors; that is, to audit the account; and where is the power of the Court to shackle or restrict, the auditors in the exercise of their legitimate powers? and where do the auditors find their powers to open a case, alter their report in the amount, and amend it in other particulars without the sanction of an oath to their proceedings, and yet refuse to do the only act, they are empowered by law do?

The grossest injustice is done, wherever triers presume to exercise improper jurisdiction, or practice upon abitrary rules, not warranted by the settled rules of law.

Argument for the plaintiff.—1st. It is not perceived, why the article is not a proper one to be charged on book; nor why 2,000 lbs. may not be charged as well as 200 lbs. or 20 lbs; nor is it perceived, why the charge being in one item only, can make any difference. It is the character of the article, charged, and not its value which controls in this respect. Brayt. 39, *Fields, Gates & Co.* vs. *Sawyer.*

2d. The auditors, having decided, that the charge was a proper book charge, admitted the parties to their oaths, and heard their testimony, and their other proofs, and from the evidence, found a sale of the property by the plaintiff to the defendant. This was a fact for the auditors to pass

upon; and this fact being found by them, it is not for this Court to determine, whether they decided right or wrong. But, from the evidence, they did not find, that any specific price was agreed on by the parties. They therefore found that the defendant was to pay what the article was reasonably worth. This was the correct, legal, inference, (2 Bl. Com. 443.) and did justice between the parties.

The report goes on to state, that certain proposals in regard to the price, were made between the parties. But what those proposals precisely were, is uncertain. But, notwithstanding this uncertainty, they find a sale. Still it is not perceived where, in this, they have mistaken in point of law.

This part of the report is nothing more nor less, than a statement of the *difficulties arising on the facts.*

Still, notwithstanding these difficulties on the facts, they find a sale, and for a price uncertain; and, from the whole matter, infer, that the defendant was to pay the just value of the wool. We insist, that was the legal, and the only inference to be drawn in the case.

3d. It is further complained, that the auditors refused, on the second meeting, to open the case for a hearing on the merits, though requested.

In answer, it may be said, that their report had never been set aside; but was simply recommitted. The object of the recommitment, undoubtedly, was, to enable the auditors to append to their report the account of the defendant, which they had no doubt by accident, omitted to do; and which omission was made the ground of exceptions. The auditors being satisfied with the report, so far as the merits of the case were concerned, declined a second hearing. This we claim, they were not bound to grant, as a matter of right, and therefore that in this report, they did not err in point of law.

The opinion of the Court was pronounced by

Hutchinson, C. J.—The first exception to the report of the Auditors, raises a question, which goes to the whole action. The plaintiff's account consists of one item only, and that a pretty large one; being for 2088 pounds of wool—amounting to several hundred dollars. Whether

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this charge can be recovered in this form of action, must depend upon the facts found and reported. It does not seem practicable to decide as to the form of the action, merely from the magnitude or value of the article charged. While the ordinary deal between A and B may comprise articles of a small quantity, and of a few cents value only, that between C and D may be a wholesale deal, and of a value extending to hundreds of dollars. Nor, in this respect, does it make any difference, whether the charge be 2088 pounds of wool, or the fleeces be charged separately, as delivered at the same time. The weight of evidence may be assisted by particularity; but it need not affect the form of action.

There is such an infinite variety in the trading transactions among mankind, the distinction between what may, and what may not, be litigated in the book action, must be drawn from the character, not the amount of the deal. Where the claim is, to recover for property sold and delivered, and to recover its fair value, there appears no very weighty objection to recover in this form of action. It is urged, that it lets the party in as a witness, which is improper in such large claims. It does let in the party as a witness; but it lets in both parties to the same point.—The testimony of one may neutralize that of the other; or may be fully confirmed by the silence of the other, when called upon to testify. It is not a matter of course to allow a charge on book, whether large or small, because the party swears to it. His testimony must be weighed in connection with all other testimony on both sides; and will be affected one way or the other by the regularity of his books of account, or the want of such regularity. Nor will it change the form of action, that the price charged, was agreed upon by the parties. That is good evidence of its fair value. But the claim must be for the value of property sold and delivered, or of services done and performed. It must not be a mere claim for damage for not performing some special contract, nor for compensation for a tort committed.

If we understand the defendant's counsel, they scarcely deny there being a sale of the wool. They say, there were

terms and conditions, and and some risk on the plaintiffs about the price that would be realized in market. These things, if proved, would have a bearing upon the price.— But this part of the defendant's argument, does not seem well sustained by the facts reported by the Auditors. They report a contract, that the defendant should buy the wool of the plaintiffs, and that it was delivered at the time agreed on. This amounts to an absolute sale of the wool. They also report a minute made at the time of delivery, and that the same, shortly afterwards, was charged on book. But they also report, that certain terms and conditions were agreed upon, and speak about a choice left to the plaintiffs about retaining some risk about the market price. Two reasons are apparent, why this should not affect the decision of the cause. 1st, The Auditors not only have not reported what these terms and conditions were, but they have reported it to be uncertain what they were. Probably the testimony was too indefinite, or too contradictory, for any result to be drawn. What, then, should be the effect of this upon the action? Plainly, the party who would wish to derive benefit from these terms and conditions, & a power of choice, &c. fails to prove what he relies upon. Hence he derives no benefit from it.

2d, The Auditors have reported, that, whatever election should be made among those terms and conditions, was to be made at the time of the delivery of the wool, which was a few days after the contract of sale. It not appearing that any election was made at said time of delivery, it must stand as a general sale. Indeed, in all cases of a sale and delivery, the law attaches to the person who purchases and receives the property, a liability to pay for the same according to its fair value, and that within a reasonable time.— And, if the purchaser is disposed to contend for any thing different from this, the burden of proof is on him, to show something that will lay the foundation for a different result In this case, the Auditors have found a sale and delivery of the wool; and the defendant has failed to prove before them any fact, varying the liability which the law attaches to such sale and delivery.

There appears less importance in another principle,

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now presented. The Auditors, to their first report, attached a copy of the plaintiffs' account, but none of the defendant's. For this neglect, the report was recommitted. They have attached a copy of this to their second report, stating which items they have allowed, and which they have disallowed; and have added, that this is but the transcript of the same account exhibited and adjudicated upon, at the making of their first report. They have also reported the correction of a mistake in computation in making their first report, of about twenty dollars. The defendant's counsel raise no objection to all this; but they complain, that the defendant, at the last meeting of the auditors, was denied a hearing upon the whole merits of the case. This we must understand to mean a rehearing upon the whole merits, heard at the first trial, and presented in the first report. The rule of recommitment does not define what the Anditors were further to do; but they drew a just inference, when they decided to do what they before had left undone, and for the not doing of which the cause was recommitted. They were under no obligation to go over the whole ground again, and report anew upon the whole testimony. Nevertheless, if important new testimony was presented, not in the power of the party at the first hearing, they ought to have listened to this, and let it produce a just effect upon the cause. But there is no pretence that any such new testimony was offered before the Auditors.

Upon the whole, we consider, there is no error in the judgement, rendered by the County Court, upon the reports of the Auditors, and their judgement is affirmed.

Smith & Sargeant, for the defendant.

Bennett & Aiken, for the plaintiffs.

JESSE LAPHAM et al. vs. JOSEPH CURTIS.

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It is the duty of A., who has a dam across a stream, which raises a large pond, to use ordinary care and diligence in making repairs to his dam, or in drawing off the water, to prevent injury being done to B's mills below on the same stream. If A. do not use care and diligence, he is guilty of negligence, and liable for consequential damages; but not for inevitable accidents.

This was an action on the case, tried at the County Court, September Term, 1832, on the general issue of *not guilty*.

Upon the trial of said issue, evidence was given by the plaintiffs, tending to show, that the plaintiffs, at the time mentioned in their said declaration, and for several years before, had been and were jointly concerned in carrying on the furnace business at their furnace below the Dorset pond, so called, in Dorset, in said County; and then had upon and about their said furnace-yard, divers stoves, pig-iron castings, and other property, as stated in their declaration.

The plaintiffs further gave evidence tending to show, that the defendant then was, and for many years before had been, the owner and possessor of a saw-mill and dam, erected at the outlet of said Dorset pond, and above the plaintiffs' said furnace, upon the same stream; by means of which said dam, the plaintiffs had raised, and kept raised, a large body of water, about one mile in length, varying in width from a few rods to half a mile, and raised about ten feet above the natural surface of said pond,—that on or about the first of December, A. D. 1830, the said dam of the defendant gave way, and let down the whole body of water in said pond upon the works of the plaintiffs below; and that said water swept away and destroyed the property of the plaintiffs to a large amount, as stated in their declaration; and that at the time the said dam so gave way, there had been no unusual fall of rain, and the water in said stream was not above its ordinary height.

The plaintiffs further gave evidence tending to show, that the defendant erected his said mill-dam about fourteen years before the year 1830, and that two or three years before the said dam gave way as aforesaid, the said dam, and the floom of said mill had been, and continued to be, and at the time of said giving way was, in a rotten,

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decayed, dilapidated and unsafe condition, and insufficient to restrain the said body of water so raised thereby as aforesaid; and that the defendant, during all that time, knew and well understood the condition of said dam and floom, and neglected to repair the same, though he kept the said body of water raised by the said dam whenever he wanted to use the same; and that the defendant, in the month of January, A. D. 1830, had been specially requested by the plaintiffs, in writing, to repair his said dam, or draw off his said water.

The plaintiffs further gave evidence tending to show, that in consequence of the said rottenness, unsoundness and insufficiency of said dam and floom, and for want of due reparation thereof, the same gave way, and let down the water of said pond upon the plaintiffs, to the destruction of their property, as aforesaid.

Evidence was also given tending to show, that said dam, as it was originally constructed, was sufficient for the purpose for which it was designed.

The defendant introduced evidence, on his part, tending to prove, that he had erected a mill-dam upon the same site, which he had owned above forty years, and more than twenty years before the erection of the plaintiffs' furnace—that the dam in question was erected about twelve or fourteen years previous to its going off—that it was built substantially, and was safe and secure as dams in general—that it was kept in repair—that a new bulk-head was built four or five years before it went off, and that the dam was repaired by putting on gravel the year before, and other repairs made to the floom—that when the water was high, the gate was hoisted, and water let off—that the dam was not more dangerous than dams in general—that, altho' damage had been apprehended the spring previous, it was not considered at this time as dangerous—that the day before the dam gave way, water was coming into the pond fast; the gate was hoisted—that at this time, the water probably broke through on the west side of the pond, where no one had apprehended danger or insecurity at any time—that the mill of the defendant was carried off at the same time, and the main channel is now

nearly under where the mill stood—that one of the plaintiffs had said that he did not expect the mill would go off at that time—that another of the plaintiffs had said that he thought the water went off under the mill, and never suspected that it would break through under the mill—that another of the plaintiffs had said that he did not consider the defendant to blame, or that he had told another that he, the defendant, was not to blame, and that he would not consent to bringing the suit until the very last.

The defendant then offered testimony to prove, that the plaintiffs, when they erected the furnace, considered that danger was to be apprehended from the dam, and that they should have to repair it to secure thir works; which was objected to, and excluded by the Court.

The defendant introduced Pratt Curtis as a witness on his part, to whose admission the plaintiffs objected, on the ground that all the real estate of the defendant, in Dorset, was attached, including the mill site, and was still holden on the plaintiffs' writ, and that since the commencement of the suit, the said Pratt had purchased of the defendant his saw-mill site, and a part of his other real estate in Dorset. The only evidence to support the objection was, the attachment, and the said deed of conveyance, marked A: both of which are referred to, and made part of the case.

The Court overruled the objection, as the evidence did not show any interest in the event of this cause. To which decision of the Court, the plaintiffs excepted.

The plaintiffs contended to the jury, and requested the Court to instruct them in charge, that the party erecting a mill-dam, and thereby raising a water power, is bound to use reasonable and ordinary care and prudence in its construction, considering the quantity of water raised, and the condition and character of the property on the same stream below; and that after it is constructed, he is bound to use reasonable & ordinary care, seeing that the same is kept in reasonable and ordinary repair; and that if the same should become insufficient and dangerous, he is bound, on knowing the same, with reasonable and ordinary diligence to put said dam in reasonable and ordinary repair, or draw off the water; and for the want of reasonable and ordinary care and prudence in the original construction of said

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dam, or in the repairing or keeping in repair the same, the said dam by reason of the insufficiency thereof (there being at the time no extraordinary flood of water) should give way, to the injury of the property of those below, the party so neglecting would be liable for all the damages thereby sustained.

The defendant contended and requested the Court to charge the jury that unless the defendant was guilty of gross negligence either in building or neglecting to repair the dam so as to manifest a mischievous intent on his part he would not be liable in this action.

1st. The Court charged the jury that a person erecting a Mill Dam, and thereby collecting a pond of water, must erect it in a careful and prudent manner, and make it secure so as not to subject the owners of property below to any great danger; that the erection of a dam and collecting a body of water, would necessarily subject them to an increased hazard, but this could not be avoided, but was incident to property situated on a stream of water on which were Mill Sites. That whenever a person erected a dam, regard must be had to the situation of the property below at the time it was erected, that if but little or no property below would be exposed to damage at the time such dam was erected, less care would be required of the person erecting the same, and that the person building it would be justified in building a dam of less strength and at a less expense than would be required, if buildings and machenery to a great amount were then standing on the stream below and would thereby be exposed to an increased danger by collecting the pond, but it must be so constructed as not to be manifestly insufficient and dangerous to those below.

2d. That the duties and liabilities of the party erecting such dam, would not be increased or enlarged by any one erecting mills or machinery below, after such dam was built. That if those below considered the dam above insufficient and dangerous, and should request permission to repair the same, and the owners of the dam should refuse such permission, it might be considered as a wanton refusal on his part, and subject him to damages for any injury sustained by such insufficiency; that a notice by the owners

below to the owners of the dam of the insufficiency thereof and a request to repair the same would not lay him under any additional obligation to repair the same and would have no other effect except as it might be evidence of his knowledge of such insufficiency.

3d. The Court further instructed the jury, that if the dam, after its erection should get out of repair and become manifestly insufficient and imminently dangerous, it would be the duty of the owners to repair the same—but if it became manifestly insufficient and manifestly dangerous and that was known to the owner, and in consequence of such insufficiency should break away and injure those below, the owner would be liable for the damages occasioned thereby. That if the jury believed that this dam was or had become dangerous and insufficient as above stated, and that known to the defendant, and he had neglected to repair the same, and in consequence of such insufficiency the dam had broken away and occasioned the injury to the plaintiffs, they would return a verdict for the plaintiffs for the amount of the damages which they had proved; but if they did not believe that the dam was manifestly insufficient and dangerous, or if they believed that it broke away in a place where it was generally considered as safe and secure, and from which no danger was apprehended, and where the defendant had no knowledge of its insufficiency, no recovery could be had by the plaintiffs, although they should believe it was insufficient in other places. The plaintiffs excepted to the charge of the Court as well as to the decision of the Court admitting the testimony of Pratt Curtis, and prays that the exceptions may be allowed, and the case pass to the Supreme Court.

Bennett & Aikcn, for plaintiffs.—Is Pratt Curtis a competent witness? The writ in the present action shows the whole real estate of the defendant, lying in Dorset, attached at the suit of the plaintiffs.

The deed from Joseph Curtis, the defendant, to Pratt Curtis, shows the mill site and other real estate of the defendant, being also part of the property attached, to have been conveyed after attachment by said Joseph to said

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Pratt for a valuable consideration, with covenants of warranty, reserving a life estate to said Joseph and his wife in the use.

By the attachment, a lien was fixed on the land attached, in favor of the plaintiffs. The land is thereby taken and secured in pledge to satisfy the judgement which may be recovered in this action; though this lien cannot in strict propriety be called an estate in the land, yet it is an incumbrance on the land, and is so regarded by the Statute.—Comp. Laws, p. 109.

Pratt Curtis then has a direct interest to release his land from this incumbrance, and that is the object and effect of his testimony. There, then, is a direct interest which will exclude him, be that interest ever so small.

Again, To apply another test of interest, the verdict in this case may be used in an action of ejectment hereafter to be brought by the plaintiffs against Pratt Curtis for the same lands.—4 Binney, 83.—2 John R. 394.—7 Com. Dig. 470.—Phil. Ev. 44–46.

This is not a contingent interest, but it is a direct interest already fixed. The lien is now perfect, and the testimony of the witness goes to defeat it. Suppose the incumbrance had been created by mortgage instead of attachment, could Pratt Curtis be a witness to prove the mortgage debt paid, in an action on the personal security? In that case, as in this, it might be said to be doubtful whether the plaintiffs would resort to the lands pledged.

The interest of Pratt Curtis is not balanced by his covenant of warranty. This puts him precisely on the same footing of bail. A contract of indemnity from the principal or from back-bail, cannot neutralize the interest of bail. A present certainty is not balanced by a future possibility.—3 East. 7, *Owen* vs. *Mann*.—2 Day's Rep. 399.

The remaining questions arise on the charge of the Court.

We object to the charge—

1st, Because it requires only that a dam should be so built as not to be manifestly insufficient and dangerous to those below.—2 Aiken, 184.—1 Swift, 111.

2d, Becuuse it makes it the duty of the owner to repair

only when his dam has become manifestly insufficient and imminently hazardous. And,

3d, Because it denies that any increased care or vigilance, on the part of the owner, is required upon any change subsequent to the erection of the dam in the amount of consideration of the property below.

The term "*manifest*," means *obvious, view clearly, apparent, plain;* and as used by the Court, presupposes no examination for the purpose of discovering defects.

The word "*imminent*," from its etymology, as well as its approved use, means *threatening, impending, ready to come, near at hand, hanging over, approaching.*

We claim that the standard of duty and obligation thus set up by the Court in the charge, is too low,—that in the original erection of a dam, as well as in its subsequent reparation, the law will be satisfied with nothing short of *ordinary care, vigilance and prudence.* The term we here use, as it is used in Jones, in his Treatise on Bailments, pages 9 and 10.

It requires no argument to show that reasonable and ordinary care and prudence is of a character decidedly superior to that required by the charge of the Court; for this would require a man to erect a dam apparently sufficient, and would require him to repair it before danger had become "impending, near at hand, ready to come, threatening." None but very careless and inattentive men would pursue the course sanctioned and approved by the charge of the Court.

It is an elementary principle—a maxim of the law, that *every person must so use his own property as not to injure the rights of others.* The right to use water, is one of great value and importance; and for ought that can be discovered to the contrary, falls within the same principle. The party over whose land water flows, must use it in a reasonable manner, so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below. He must not shut the gates of his dam and detain the water unreasonably, or let it off in unusual quantities.—3 Kent. Com. 354.—2 N. H. Rep. 537, and cases there cited.

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It is a general principle that negligence of one's own property, or in the exercise of one's rights, in consequence of which another suffers damage, will subject the negligent party to an action

Thus animals of a dangerous nature, or accustomed to do mischief, must be restrained by their owner, or he will be liable for all the damages.—1 Com. Dig. 418.

Fire must be kept with care—otherwise the negligent party is liable for all damage it occasions. True, in case of accidental fire, the action is taken away by Stat of Ann. 1 Com. Dig. 419.

Yet when *negligence* is the cause of the injury, action lies as at Common Law.—8 John. Rep. 421.

Tenant for life or years, negligently permitting buildings, fences, ditches or embankments to become ruinous, to the injury of him in reversion or remainder, are liable.—Coke Litt. 53–54.

If I neglect to repair my partition-wall, whereby the filth of my privy flows into my neighbor's cellar, I am liable.—1 Salk. 21.—6 Mod. 311.

If I neglect to keep in repair the grate or bars that cover an opening into my cellar or vault, and my neighbor falls through, action lies.

Negligence in driving a carriage or team upon the highway, or navigating a ship or other vessel upon the seas, to the injury of others, lays the foundation for an action for all damages.—3 East. 593.—Sel. N. P. 456–9.—1 Camp. 497.—8 T. R. 188.—Sw. Dig. 551.

The general rule to be extracted from all the cases, is, that the want of reasonable and ordinary care and prudence *at the least* in the management of one's own business, in consequence of which another suffers damage, subjects the negligent party to an action.

The same doctrine must obtain in regard to negligence in the use of water.

Public policy and private interest both require the adoption of the principle for which we contend.

The cases cited in regard to the use of this right, show no distinction in this respect between this and other property.

The same doctrine is virtually established by adjudged cases.—2 John. R. 284.—17 John. R. 92.

If this reasoning be correct, it covers all the points noted as erroneous in the charge.

L. Sargeant, contra.

The opinion of the Court was pronounced by

BAYLIES, J.—The record shows what evidence the plaintiffs introduced to support the issue on their part; also the evidence which the defendant introduced. If the jury found the facts which the defendant's evidence tended to prove, what is the operation of law upon these facts? Before I attempt to answer this question, I will state the law as it is generally understood in *England*, and in the United States. In the case of *Barber* vs. *Shaw et al.* 6 East. 208, the Court say, an adverse right may exist founded on the occupation of another. And though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking, or using it, has existed for so long time as may raise the presumption of a grant, the other party whose land is below, must take the stream subject to such adverse right. I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant, or act of Parliament.

Swift, Ch. J., says, "A special right, different from the general one, may be acquired by an adjoining proprietor, by grant, or by possession for such length of time as will furnish presumptive evidence of a grant. In England, it has been decided, that twenty years exclusive enjoyment of water in a particular manner, affords a conclusive presumption of a right in the party enjoying it, derived from some individual having the power to make it, or from the Legislature; and in this State, fifteen years exclusive enjoyment will furnish the same evidence. Such exclusive right, however, must be measured and limited by the extent of its enjoyment, and the occupier can no more enlarge it, than he can assume a new right."—*Ingraham* vs. *Hutchinson*, 2 Con. R. 584.

Mr. *Angell*, in his valuable Treatise on the Common

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Law, in relation to *Water Courses*, page 42, says, "The privilege of using the water in any particular manner, and of diverting it in any quantity, may also be acquired by *usage*; which, when continued without interruption for a great length of time, has all the validity and effect of an express grant." He refers to 2 Vernon, 390, and Sull. on Land Tit. 273. In page 44, he says, "The principle of acquiring a right to incorporial hereditaments by an enjoyment of twenty years, is derived from the Statute 21 Jac. 1, which enacts that no person shall make entry into lands, but within twenty years next after his right or title shall first descend or accrue to the same." He also says, "If a water-course is in any way diminished in quantity, yet if the occupation of the party taking and using it, has existed for twenty years or more, the party whose land is below, must take the stream subject to the *adverse right*." In page 48 he says, "The *usage*, which is thus supposed to be founded on a grant or agreement, will determine the extent of the supposed grant. The right granted, is considered to be commensurate with the right enjoyed. A person, who has enjoyed a limited right, cannot lawfully enlarge it to the detriment of others; and in case of such enlargement, those who are prejudiced may lawfully obstruct the use in the *newly acquired* part; but still he will be entitled to his former right, both to the same extent, and in the same specific manner."

Chancellor *Kent* (3 Com. 356) says, "The general and established doctrine is, that an exclusive enjoyment of water or of light, or of any other easement in any particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not asserted. The right is confined to the extent, and the mode of enjoyment during the twenty years. All that the law requires is, that the mode or manner of using the water should not be materially varied to the prejudice of other owners; and the proprietor is not bound to use the water in the same precise manner, or to apply it to the same mill; for such a construction of the rule would stop all improvements in machinery. He is only not to vary the enjoyment to the prejudice of his neighbor."

If it be true that the defendant "erected a mill-dam upon the same site which he had owned above forty years ago, and more than twenty years before the erection of the plaintiffs' furnace—that the dam in question was erected about twelve or fourteen years previous to its going off—that it was built substantially, and was safe and secure as dams in general—that it was kept in repair, &c.," as the evidence tended to prove; then the defendant acquired certain rights: that is, by a *usage* of forty years he acquired the right to have, and support a dam across said stream, and to raise the water to a certain height. And also by forty years exclusive enjoyment of the water in the pond, raised by said dam, he acquired a right to the use of the water in future, as he had used it in time past. In analogy to our Statute of Limitations, these rights were perfected after the lapse of fifteen years. And notwithstanding these *rights*, the defendant's duties and liabilities might be greatly increased by other persons' erecting mills on the same stream. Before the plaintiffs erected their furnace, the defendant, if he injured no person above nor below him, might raise the water in the pond to any height he pleased, and might suffer his dam to decay, till the water crushed it, and went off in a body. But after the plaintiffs erected their furnace below on the same stream, the defendant could not lawfully raise his dam above its usual height so as to lessen the flow of water to the plaintiffs' furnace; nor suffer his dam to decay, break down, and let off all the water at once, to the injury of the plaintiffs.

But the defendant was subject to the maxim, *Sic utere tuo ut alienum non lædas.* To comply with this requisition of the common law, it was the duty of the defendant to have used ordinary care and diligence in making repairs to his dam; or in drawing off the water from his pond, to prevent injuries to the plaintiffs' furnace. If the defendant did not use this care and diligence, he was guilty of negligence, and liable for consequential damages; but he was not liable for *inevitable accidents.*

After the defendant's land was attached in this suit, he deeded a part of the same land, with the attachment thereon, to *Pratt Curtis*, whose interest it was to remove this incumbrance from the land. With this interest existing,

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Pratt Curtis was not a competent witness to testify for the defendant.

Inasmuch as the County Court admitted said witness to testify on the part of the defendant, and instructed the jury contrary to the aforesaid principles of law, as to the defendant's *duties* and *liabilities*, the judgement of the County Court is set aside, and a new trial granted.

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WILLIAM DENTON VS. JOHN PERRY and BELA R. PERRY.

That a deed may be impeached by proving the sayings of the grantor, after the date and signing, but before the acceptance by the grantee.

That a creditor, attaching land after a deed from his debtor is on record, can hold the land against such deed, on proving that such grantee had not accepted the deed.

This was an action of *ejectment*, brought to this Court by a bill of exceptions, allowed by the Judges of the County Court, which is as follows, to wit:

The plaintiff in this case, claimed title to the premises in question, by virtue of the levy of an execution in his favor against John H. Perry and Hiram R. Perry; and read in evidence a deed from Jabez Perry to John Perry, the defendant, from John Perry to Abel Edgell, and from Abel Edgell to John H. Perry, and the record of the judgement execution and levy thereon in his favor against the said John H. Perry and Hiram R. Perry. The writ, on which the judgement was rendered, was dated 9th January, A. D. 1827, and served by attaching the land in dispute as the property of the said John H. Perry, the 10th January, 1827.

The defendant then read in evidence a deed from John H. Perry and Susan Perry to the said John Perry, the defendant, dated the 4th January, 1827, and recorded the 9th of the same January, together with the deposition of Abraham Dame, to which the deed is annexed; and also a deed from the defendant, John Perry, to the other defendant, Bela R. Perry.

The plaintiff then introduced evidence to show, that, on the day he attached the land, viz. 10th January, 1827, his agent enquired of said John Perry, who owned the land in

question? & that he replied, "John H. Perry;" & that the land was attached in the presence of said John Perry.— The plaintiff further offered the depositions of David Beal, Abner Millet and Silas Peirce. These depositions were objected to by the defendant as being the evidence of the declarations of John H. Perry after the date of his deed to the plaintiff. The Court decided, that, inasmuch as evidence had been given, tending to prove, that the said deed was executed when the said John Perry was not present, and also, that, after it was on record, the said John Perry had admitted the title to the land to be in John H. Perry, evidence of the declarations of said John H. Perry was admissible in evidence to put the defendant upon shewing a consideration for the deed, and admitted the depositions.

The defendant then read the depositions of Abel Edgell, Ephraim Ranney, Hiram R. Perry and John H. Perry; and also another deposition of Abraham Dame, taken by the plaintiff.

No evidence was given to shew by whom the deed from John H. to John Perry was delivered to the County Clerk for record,

The plaintiff contended, that the deed from John H. Perry to John Perry was executed in the absence of said John Perry, and was not delivered to, or accepted by him, when the plaintiff attached the land; and further, that the deed was given to defraud the creditors of the said John H. Perry, and therefore void.

The defendants contended, that the deed was executed for a legal consideration, and would take effect from the time of recording; and requested the Court so to charge the jury.

The Court charged the jury, that, if the deed was executed by the said John H., in the absence of said John Perry, and had not been delivered to, or accepted by the said John Perry, or some one authorized by him, at the time of the levy of the plaintiff's attachment, the attachment would take precedence of the deed, notwithstanding the deed might be executed upon a good consideration.

But, if the jury found, that the deed had been accepted by the said John Perry, or by some one authorized by him, and placed upon record, the title to the land would be in

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the defendants, unless they found it was fraudulent, (explaining what would constitute a fraud so as to avoid the deed).

The defendants excepted to the decision of the Court in admitting the depositions; and also to that part of the charge in relation to the delivery and acceptance of the deed. A verdict was therefore given for the plaintiff and judgement thereon.

W. C. Bradley, for defendant.—On the trial, two exceptions were taken on the part of the defendant:

1st, To the admission of the depositions of Beal, Millet and Peirce.

2d, To the charge of the Judge as to the evidence of the execution of the deed.

I.—As to admitting the depositions which go to prove,

1st, That John H. Perry was in failing circumstances.—This certainly is no ground for compelling the defendants to give evidence of consideration beyond their deed—such being the ground of admission by the Court.

2d, The declarations of John H. Perry as to want of consideration. These declarations, the defendants contend, ought not to have been admitted, whether we regard the rule of *Walton* and *Shelly*, 1 T. R., that a grantor shall not impeach his own deed, or the doctrine of *Jordan* vs. *Lashbrooke*, 7 T. R. 601, adopted by that of *Nichols* vs. *Holgate*, 2 Aikens 138, by which the testimony of John H. Perry was admissible, and therefore his conversations not the best evidence. And, on any ground, there can be no pretence, that his admissions, made *subsequent* to the time of signing and executing the instrument, are admissible to impeach the deed.—1 Stark. Ev. 307.—2 Phil. Ev. 214.—1 Esp. Rep. 357.—14 Mass. Rep. 245, *Bridge* vs. *Eggleston*.

If not admissible to impeach the deed, defendants are not aware of any law which makes them so, for the purpose of compelling them to prove consideration.

Nor are they aware how John Perry's supposed admission of John H. Perry's ownership can have that effect.—The admission is sufficient of itself, or it is not. If sufficient, other proof is unnecessary and improper. If not sufficient, it is contrary to every rule, that the defendant should be compelled, by other proof, to do away its effect.

II.—As to the charge in relation to the execution and delivery of the deed.—

The charge evidently implies, that the actual delivery to John Perry, in person, or the actual authority, by which the agent, who accepted the deed, was constituted, should have been proved; and must have been so understood by the jury.

The defendants contend, that neither was necessary; for,

1st, The delivery is sufficiently proved to have been for the use of John Perry; and such delivery to a stranger even is good.—*Hatch* vs. *Hatch*, 9 Mass. 310.—*Ruggles* vs. *Lawson*, 13 John. R. 285.—*Verplanck* vs. *Story*, 12 John. R. 536.—*Wilt* vs. *Franklin*, 1 Binney, 502.—2 Stark. Ev. 477.—1 Wood's Conveyancing, 311. And the acceptance in the case of a deed poll, where nothing is to be done by the other party, is presumed in law—it being on the face of it for his benefit.—1 Show. 303.—1 Wood. Conv. 312 (note a.) And the authorities do not countenance the avoiding this implied acceptance *by parol in pais*, without either *act in pais*, or deed.—1 Wood. Conv. 312, 313.—3 Con. Rep. 26. Suppose it could be by parol, every consideration requires, that the disagreement should be direct and in reference to the deed, in such manner as to shew the party conusant thereof, not by inference from general expressions as to title,—otherwise the party must be supposed to disagree to a matter, of the existence of which he may be ignorant. Besides, it is only in cases where no one appeared on the part of the grantee, that questions of disagreement have arisen.—Here an agent appeared, and accepted the deed, and of course, the title vested absolutely from the moment of record.

2d, There was no necessity of proving the manner of H. R. Perry's authority. It was sufficient that he appeared and acted as agent—especially until his authority was disproved, or directly disavowed by John Perry. And there was sufficient reason to presume it, from his situation in the family, and his having himself paid part of the mortgage debt. For it is to be observed, that the same presumption, arising from relationship, which might aid a suggestion of fraud in the consideration, against a deed otherwise regular, is in favor of his mere authority in taking the deed, as

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being the person most likely to be so requested by the father. In addition to all this, the plaintiff having, without objection, admitted the depositions on the part of the defendants, and particularly the second one, of Dame, which was filed by himself, he was not at liberty to dispute the power afterwards in argument. If he meant to require farther proof of authority, he should have objected.

Lastly, It is not the case of a *creditor* merely, but of a mortgagor, who had paid his debt, and needed nothing but a discharge of record, which the deed in question was in effect.—This having been put on record before the plaintiff's attachment, he cannot complain of want of notice; and the record, even without acceptance, restored the original and complete title of John Perry, both in law and equity. If the plaintiff meant to contend, that the mortgage had not been paid, and that the discharge was, for that reason, fraudulent, the trial ought to have been put on that ground, unmixed with the decisions, against which the defendants contend; and, supposing Denton's title good against John Perry, how does it affect Bela R. Perry, who does not appear, from the case, to have been other than a *bona fide* purchaser without notice of John Perry's conversations?

Mr. Kellogg, contra.—The first question arising in this case, is, as to the propriety of admitting the depositions of David Beal, Abraham Millet, and Silas Peirce.

1. The admission of this testimony does not conflict with any established principle of law.

At the time of the declarations of John H. Perry, set forth in the depositions, John Perry made no claim to the land, nor had the deed been delivered to, and accepted by John Perry; nor did any consideration pass at the execution of the deed.

John Perry subsequently declared to the agent of the plaintiff, that the land belonged to John H. Perry.

The declarations of John H. and John Perry were then perfectly consistent with each other; both declaring that John H. owned the land.

2. The case finds, that the defendants introduced the deposition of John H. Perry.

Surely, then, the declarations of John H. Perry, contradicting or varying the testimony contained in his deposition, were proper to be received and weighed by the jury.

The second question presented in the case, arises upon the charge to the jury, which the plaintiff insists was correct.—

1. The conveyance from John H. to John Perry, was not consummated until the deed was delivered to, and accepted by, John Perry.

2. Until the delivery of the deed to, and acceptance by the grantee, no title passed; but it remained in the grantor.—Delivery is essential.—12 Mass. Rep. *Harrison* vs. *Phillips' Academy*, 456, 461.

3. The recording of a deed does not amount to a delivery.—10 Mass. *Maynard* vs. *Maynard*, 456, 458.

4. The grantor, John H. Perry, had a right to retain and cancel the deed, at any time before delivery to, and acceptance by, the grantee, even after the same is recorded.—10 Mass. *Maynard* vs. *Maynard ut supra*.

The Court left it to the jury to find, whether the deed had been delivered.

The opinion of the Conrt was pronounced by

HUTCHINSON, C. J.—It appears, by the bill of exceptions, that both parties claim the land, now in dispute, under John H. Perry. The plaintiff claims by virtue of an attachment and levy; and the defendants claim by virtue of a deed from said John H. Said deed was executed January 7th, 1827, and recorded on the 9th of the same January. The plaintiff attached the land by his writ on the 10th of said January. The regularity of the plaintiff's judgement and execution and levy are not disputed. But the defendants' deed was upon record before the plaintiff's attachment was put upon the land. The defendants thus appearing upon the record to have the prior title, the plaintiff has resorted to other sources of testimony, to show himself entitled to recover, notwithstanding the defendants' apparent prior title.

He first introduced a Mr. Baxter, whose testimony tended to show, that, after the defendants' deed was thus upon record, and on the day the plaintiff's attachment was ser-

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ved, the defendant was asked who owned said land? and his reply was, that it was owned by said John H. Perry.— Upon this testimony, the plaintiff's counsel contended, that the deed was not so accepted by the defendant as to vest the title in him, when the plaintiff's writ was served, which created his lien upon the land.

The plaintiff also contended, that the deed from said John H. Perry to the defendant was fraudulent and void, and given on the eve of the failure of the said John H., and given with intent to defraud his creditors. For this purpose he introduced three depositions, which were objected to by the defendants, but were admitted by the Court. These depositions tend to prove, that the said John H. Perry failed in business on the 5th day of said January, the next day after his deed to the defendants; and also tend to prove the declarations of said John H. Perry, made after the date of his deed to the defendants, which, if proper in evidence at all, do tend to show said deed fraudulent and void as against the creditors of said John H.

Whether these depositions were correctly admitted or not, depends upon the decision of another question, whether the deed of John H. Perry to John Perry had become complete, by delivery and acceptance, when the sayings of John H. were uttered. For, surely, a man, who has conveyed land by a deed of conveyance, which has become complete, cannot defeat that conveyance by his after concessions merely. When the grantor ceases to have any interest, against which his concessions can operate, those concessions are not admissible against third persons, claiming under that title. Whether he could be called as a witness to impeach such conveyance, depends upon other circumstances. It seems by the testimony of Mr. Baxter, that the plaintiff caused a prudent enquiry about the title before he attached the land. The enquiry was made of John Perry himself. He, instead of setting up any title in himself, said the title was in John H. Perry. The fair inference from this was, that he knew nothing about the deed from John H. to him, or thought it prudent not to set up any claim of title under it, until he had accepted the deed. The title remained in John H; and his sayings, so far as they tended to show the deed destitute of considera-

tion, or otherwise void, were correctly admitted in evidence, to show the deed void as against creditors. This testimony of Mr. Baxter, if believed, excludes all that presumption of acceptance, spoken of in argument. But it is urged, in argument, that Hiram R. Perry acted as agent for his father in accepting this deed. It seems he carried the deed from the grantor to the Town Clerk's office. But whose agent does this prove him to be? Not that of John, without additional proof of an appointment for that purpose; or an acceptance by John, which acceptance, to avail in this case, must have been prior to the plaintiff's attaching the land. If the deed was under the control of John H., Hiram must be presumed to carry it as his agent. Besides, Hiram's testimony was put into the case by the defendants; and he says nothing about his being, or acting as agent for the defendant, John Perry. His silence, when it was the interest of the defendants to prove such agency, affords a strong presumption, that none such existed. These depositions were correctly admitted, at the time when they were admitted, without waiting till the defendants had introduced the deposition of John H. Perry.—Other convincing testimony of a prior acceptance by an agent with full authority to contract and receive the deed for the defendant, John Perry, might do away the effect of these depositions. But there is no such proof in the case.

If our reasons for admitting these depositions be correct, it follows, of course, that the instructions of the Court upon this testimony, were also correct.—For the instructions were, that this deed, if executed in the absence of said John, the grantee, and not accepted by him, or any one authorized by him, when the attachment was made, would not vest the estate in the defendant against the plaintiff's attachment, even if the deed were upon good consideration. The instructions, in case the delivery was complete and the acceptance proved, appear not unsatisfactory to the parties. They surely are not liable to objection; for if the deed was found by the jury to be fraudulent, it must be void as against the plaintiff, who was a creditor of the grantor.

Our decision, however, is urged in favor of Bela R. Per-

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ry, one of the defendants, on the ground of his being a *bona fide* purchaser, without knowledge of the sayings of said John H. Perry; and we are called upon to presume all this from the existence of the deed merely. There are two reasons against admitting this presumption.—1st, The service of the plaintiff's writ of attachment, and leaving a copy with the Town Clerk, were sufficient notice, that the plaintiff intended to hold this land against the deed to John: Hence Bela must expect, when he receives a deed from John, to meet whatever testimony the plaintiff might produce to support his lien against that deed.—2d, Tho' Bela's deed would, of itself, be sufficient as against his grantor, when he would hold against an attaching creditor, whose attachment was upon record, he ought at least to show a good and *bona fide* consideration for his deed.

The judgement of the County Court is affirmed.

AMASA Z. T. WRIGHT, Complainant, *vs.* OLIVER DOOLITTLE 2d, Complainee.

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That, if a plaintiff would stop a suit by notice that he should not prosecute the same, given after service of his writ, and before Court, he must give that notice by a writing, that will render the defendant safe without attending Court.

The complainant, in this case, came before the County Court, in Windham County, at the September Term of 1832, with a complaint, setting forth, that the said Oliver Doolittle 2d did, on the 30th day of August, A. D. 1832, pray out a writ of ejectment against the said Wright, and cause the same to be served upon the said Wright on the day and year aforesaid, by one Elijah Stebbins, Constable of the town of Vernon, in said County,—wherein the said Wright was directed to be had before the said County Court, at their said September Term, to answer to the said suit; and, upon the failure of the said Doolittle to enter his said suit, the said Wright, at the said Term of the County Court, entered a complaint for his costs in attending said Court upon said suit. To this complaint it was replied by the said Doolittle in objection, that the said Doolit-

tle, by a verbal message, delivered to the said Wright a few dsys before the Court, by the same officer who served the writ, informing the said Wright, that he should not prosecute his said suit, commenced by his said writ. The Court considered this fact as proved; but considered it no sufficient objection against allowance of costs to the complainant; which were allowed accordingly. To which decision, the said Doolittle excepted; and moved, that the same be passed to the Supreme Court. It accordingly comes here for consideration.

Argument for the oomplainant.—Tho objection to the allowance of costs in this case, is not sufficient.

Because the notice shown to have been given by the said Doolittle to the said Wright, that the suit abovementioned would not be prosecuted, being *verbal* merely, was no security to the complainant. In case of the death of the person, by whom the message was sent, there would have been no proof of such notice existing.

In case, too, of the death of the complainant, nothing would have been left by him to secure his estate against the consequences of the suit being prosecuted. The complainant ought, in justice, to have been furnished *in writing* with a proof of the notice, in order that he might keep by him that which would secure him against any want of good faith in the prosecution of the suit, which had been commenced against him.

The counsel for Doolittle concisely argued, that this notice, sent by the officer who served the writ, and sent within a day or two after service, comes within the same principle established in the case of *Mead* and *Arms*.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—It would be unreasonable, that a plaintiff in any suit newly commenced, should have no way in his power to stop such suit, without paying the cost of Court. He may commence the suit in good faith, yet afterwards discover some mistake, which must render the suit abortive. Hence this Court decided in the case, reported from Washington County, *Mead*, complainant, vs.

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Arms, that a notice in writing from Arms to Mead, that he should not enter nor prosecute such suit, and this notice given when no taxable cost had accrued in favor of Mead, furnished a sufficient reason for refusing Mead the taxable cost of his coming to Court with his complaint to obtain such cost. The Court considered that written notice was ample security against any prosecution of the suit by Arms.

We are now called upon to attach the same effect to a verbal notice. We think this would be unreasonable.—It would subject the defendant to the risk of the life of the person who receives and delivers the message: also to the risk of the recollection and veracity of such person. And, even if these objections were obviated, there is one more risk, that of this person's continuing to reside where his testimony could be obtained. If he trusted to such verbal notice, and remained contented without attending Court, and the action should still be entered and defaulted, all possible relief would rest on so many and so uncertain contingencies, no man should be subjected to them against his consent. The reasons, given by this Court in the case of Mead and Arms, apply to no case, except where the notice is in writing, and is of itself sufficient evidence of his authority to remain quietly at home, as he might if no writ had been served upon him.

We consider this to be the only rule that would be just and practicable.

The judgement of the County Court is affirmed.

Hayes, for the complainant.

Phelps, for the complainee.

NATHAN F. HENRY vs. JOHN BELL 2d. (In Chancery.)

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That a common quit-claim deed, with a consideration in money named, and a condition to redeem, by paying back such consideration with interest, is not evidence of a debt, like the common case of a note and mortgage, but is more in the nature of a right to repurchase.

That a man, who gives such a quit-claim deed of land, to which he professes to have no title except a mere parol right to redeem, may acquire right by descent, and hold possession adverse to his grantee.

It appears by the orator's bill of complaint, that, in August, 1820, the defendant gave to one Benjamin Henry a quit-claim deed of a piece of land, acknowledging therein, that he had received, as a consideration therefor, the sum of eighty-two dollars and forty-seven cents. To which deed was added a condition, that the defendant might redeem said premises, by giving good security in ninety days, that the same sum and interest should be paid in two years; and the complaint alleges, that the same had never been paid. It also appears, that, on the 27th day of May, A. D. 1827, said Benjamin, by his deed duly executed, assigned said premises to the said Nathan F. Henry.

The orator, in his bill of complaint, treats this quit-claim deed as a mortgage, given to secure to the said Benjamin Henry the sum of $82,47, money lent, and being the consideration of said quit-claim deed. The orator concludes, by praying for a decree of foreclosure of said mortgaged premises.

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The substance of the answer of the defendant, John Bell 2d, was, that, at the date of said quit-claim or mortgage deed, he was imprisoned in the common jail in said County, on an execution in favor of said Benjamin Henry; and had cited him to show cause why he, the said Bell, should not be liberated from his said imprisonment, on taking the poor debtors' oath. And the said Benjamin appeared to show cause as aforesaid, by showing, that the defendant had a verbal equity of redemption in the lands, described in the orator's bill of complaint;—he, the defendant, having, before that time, conveyed said land to one Samuel Fish, Jr., to wit, in May, 1817, for a debt of $300, which he then owed said Fish, who at the same time verbally promised said Bell, that he might redeem said premises by paying said sum of $300 and interest. He

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also answers, that said $300 was then about the true value of said premises. He further answers, that said Benjamin Henry, on receiving said quit-claim deed, discharged said Bell from his said imprisonment.—That he, the said Bell, considering his interest in said premises of no value, did not wish for the said condition in said deed; but the same was inserted at the request of said B. Henry.—That said Fish was present, and expressed a willingness still to convey said premises, on receiving said $300 and interest; and then promised said B. Henry, that he would so convey to him on receiving such payment. Said Bell further answers, that, on the 1st day of May, A. D. 1821, the said Fish, for the consideration of $80'75, conveyed by deed to Jennet Bell, the mother of said defendant, the eleven acres of said land, which lies north of the road, as appears by deed, &c.; and, from said last date, said Jennet occupied the said eleven acres till her decease, which was on the 5th day of August, A. D. 1825; since which time the said defendant, for himself as heir to his said mother, and for the other heirs, has occupied the said eleven acres, and still occupies the same. All which premises were well known to the said Benjamin Henry when he took said quit-claim deed, and from time to time since, as they occurred, as said defendant fully believes.

The defendant further answers, that he was in possession of said eleven acres adversely to the said Benjamin Henry at the said time, when he conveyed said premises to the orator; and, therefore, he insists, that the said last mentioned deed is void. He further answers, that he had no title whatever to any of said premises, when he gave said deed to said Benjamin Henry, except said verbal promise from said Fish, which promise the said defendant then relinquished to said Benjamin Henry; and said Fish then made a new promise to said Benjamin Henry as before mentioned.

This answer was traversed, and testimony taken by each party.

It appears by the testimony, that there was a prior mortgage deed from said John Bell, of this whole tract, which is called seventy acres in the deed to Benjamin Henry—securing to said Jennet Bell her maintenance.—And that

said Fish conveyed to her said eleven acres north of the road, upon her quitting to him the remainder of the tract, which, it seems, was upon the south side of the road; Fish receiving about eighty dollars besides.

The counsel for the orator contended, that the defendant's deed to Benjamin Henry conveyed all his right in this land.

2d, That his right was the whole land, excepting the two incumbrances—one to his mother, and the $300 due to Fish—That the defendant's right to redeem by paying the debt due to Fish, may be established by parol, notwithstanding the deed to Fish was absolute; and cited 2 Fonblanque, 263, *Walker* vs. *Walker*.—2 Atk. 388.—5 Bin. 499.—1 J. Ch. Rep. 594.

3d, That these incumbrances were off, by the conveyances above mentioned, between Fish and Jennet Bell, and by Fish's conveying a part to the Wheelers, as mentioned in his (Fish's) deposition—and that the defendant, in becoming owner or proprietor of any part of this land, must be considered as agent for Benjamin Henry; at least said Henry had a right to claim that he acted as his agent; and all would inure to the benefit of said Benjamin Henry. And the assignment of said Benjamin Henry to the orator, vests in him all the title, except the defendant's right to redeem, the foreclosure of which is now sought.

To say, that John Bell had the estate, at the time of the execution of the assignment from Benjamin Henry to orator, by an adverse title, is begging the whole question.—All the title that Jennet Bell shows, she derived through John Bell and his mortgage. And we have shown, that Jennet Bell's title was in effect John Bell's title. It is nothing more than the mortgagor holding over against the mortgagee after condition broken; and has nothing to do with the statute to prevent fraudulent speculations and sales of choses in action.

The counsel for the defendant alluded to the charges in the bill, the substance of the answer, and then concisely argued the points in issue, in reference to the testimony in the case, as follows:

The testimony of S. Fish shows the deeds to have been

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executed, as set forth in the answer; and that he understood the deed to Henry to be of the equity of redemption; and confirms the answer as to the possession of Jennet and John Bell; and as to the claim of John Bell as heir of Jennet Bell, which is also confirmed by Solyman Bell, the other witness. Samuel Fish also states his own views of the title he (Fish) held, and of the title of Jennet Bell; but this, it is presumed, cannot be considered as testimony.

If the Court shall be of opinion, that, after the discharge of Benjamin Henry's debt, there was any interest to which a release could attach, and that it was, as stated, a loan and valid mortgage, and that a decree can be made without bringing forward Samuel Fish as a party,—to all which questions the attention of the Court is called,—the defendant then contends, that the operation of the release cannot be carried beyond the time when it was given; and that no decree ought to be made affecting the title *to the eleven acres*, which has been cast on John Bell since the execution of the release; for,

1st, No right passes by a release, but the right which the releasor hath at the time of the release made—as in case of the release of the son of a disseizee in the life time of his father.—Co. Lit. 265 (Day's Ed.)

2d, An expectancy as heir is a naked possibility, and not an interest capable of being made the subject of a mortgage or contract.—*Carleton* vs. *Leighton*, 3 Merivale 667.—Cited 4 Kent's Com. 138.

We also insist, that defendant's possession of the eleven acres was adverse to Benjamin Henry, and his assignment to the orator void.—Comp. Laws, p. 171.

The opinion of the Court was pronounced by

HUTCHINSON, Chancellor.—The defendant has endeavored to place the eleven acres north of the road on a different footing from the rest of the land; and to this he sets up a title, acquired after his deed to Henry. The orator urges, that the defendant's deed to Henry estops him from treating this as adverse to Henry: That, in fact, it inures to the benefit of Henry. This depends upon the character of the deed itself. If this deed to Henry contained the usual covenants of warranty, it would clearly operate as con-

tended by the orator. It would be worse than useless to permit the defendant to take this land by purchase or descent, after his deed to Henry, and hold it against that deed, and still let Henry recover its value, and perhaps other damages, on the covenant in his deed from the defendant. This circuity of action, and the costs attending such unnecessary suits, is saved to all the parties, by the doctrine of estoppels. Indeed, this is the true foundation of that doctrine. Without it there would either be a circuity of actions, each seeking his separate remedy, or there would be an equity which ought to be enforced in some way; for no man ought to be permitted to sell his property, and receive his pay for it, and yet keep and enjoy it.— And, if one sells property by warranty, to which he has no title, and he afterwards purchases the same property, the law, transferring this newly acquired title to the grantee, in satisfaction of the covenants, does the most perfect justice, beside saving cost.

But this doctrine does not apply when a sale is made by quit-claim deed, and the grantee is made acquainted with the true nature of his grantor's title. In such case, if the title fails, the grantee has no remedy of any sort; and he *should* have none: for he knew what title he purchased; and, if he had not intended to risk the title, and give a price accordingly, he would have required security by inserting covenants in his deed.

In the case before us, there are no covenants in the deed, and there is no complaint of defendant's secreting any want of title in himself when he gave the deed to Henry. There being no claim in favor of Henry for any thing except what title the defendant then had, the defendant had a right to take an outstanding title to this, as much as any other land, either by purchase or descent, and hold the same against Henry. The eleven acres north of the road having passed to Jennet Bell in a way that Henry could enforce no claim against her, she held adverse to Henry, and to every one else. She held in her own right, and her possession was adverse to Henry. This continued from 1821 to 1825, when she died, and the title and possession passed to her heirs; of whom the defendant was one. His answer upon this part of the case is fully supported by the testimony of

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Solyman Bell and Samuel Fish. The defendant, at the time when Benjamin Henry conveyed to the orator, being in possession for himself and the other heirs of his mother, Jennet Bell, claiming title by descent, his possession was adverse to Henry, and the deed of assignment to the orator was, therefore, void by the statute of 1807, so far as relates to the eleven acres. The assignment would operate to convey to the orator what interest Benjamin Henry had in the 20 or 30 acres south of the road.

Had there been, strictly speaking, a debt secured by this deed from the defendant to Henry, that might have passed by the deed, if that appeared by the deed to be the intention of the parties. But here was no debt. The debt due to Henry was paid by the defendant's giving him the quit-claim deed. The condition of the deed secures to defendant the right of purchasing back of Henry the title his deed conveyed. But, according to the answer of the defendant, supported by the testimony, this title was nothing more than was created by the parol contract of Fish to re-convey, upon receiving his three hundred dollars with interest. And this promise was transferred with the deed, by Fish's making a new promise direct to Henry.—We discover no decree that we can make, upon the facts before us, that can be of any beneficial effect, and we are are inclined to dismiss the bill., unless the orator wishes to retain it, and amend by making Benj. Henry, and perhaps Fish a party; and effect that redemption as against Fish, without which, all his other title can avail him nothing. The defendant, in his answer, says, the condition was annexed to the deed—not by his request, but by that of Henry. It is not easy to conceive what motive either could have for requesting such a condition in the deed, when Fish was present, and virtually discharged his old promise to Bell, by making a new one, of the same tenure, to Henry.

Afterwards, the orator's counsel said, he had no wish to pursue the complaint further; and the decree of dismissal was entered.

John Phelps, for the orator.
Wm. C. Bradley, for the defendant.

Town of Dummerston *vs.* Town of Jamaica.

Windham, *February*, 1833.

In a warning under the Statute of 1801, to prevent a person from obtaining a settlement, it is not a fatal defect if the direction is in these words, "Hereof fail not, but of your doings hereon make due return," &c., omitting the words "of this precept with," &c.

When a warning issues against a man and his wife, it is sufficient to serve the same on the husband alone.

If the warning is against a person residing in a town therein named, the service is good if it is made on a person of that name in the town, if no evidence is given that more than one person of that name resided in the town.

This was an appeal taken by the town of Jamaica from an order of removal of a pauper, made by process before Justices, instituted by the town of Dummerston. It was tried in the County Court, April Term, 1832, upon the following case stated and agreed upon by the parties:

Oliver Taft and his wife Delia, (the said Delia being the pauper in question) having resided in the town of Jamaica until they gained a legal settlement, removed to Brattleborough, where they were warned in the manner shewn by the copy hereunto annexed, and after said warning, resided more than one year in said town of Brattleborough, and afterwards removed to the town of Dummerston, where they never gained any settlement, and where the said Oliver died, in 1829, and the said Delia remained until the order of removal.

[COPY.]

State of Vermont, } To either of the Constables of
Windham County ss. } Brattleboro' in said County,
Greeting.

You are hereby required to summons Oliver Taft and wife, now residing in said town, to depart said town.

Hereof fail not, but of your doings hereon due return make according to law. Given under our hands at Brattleborough, this 27th day of May, A. D. 1816.

REUBEN CHURCH, } *Selectmen.*
LEVI GOODENOUGH, }

Brattleboro', June 12th, 1816.—I then served this summons by leaving in the hands of Oliver Taft, at his abode, a true and attested copy of the same, with my return thereon endorsed. Attest, DANIEL BLISS, *Constable.*

Received and recorded, June 12th, 1816, by
STEPHEN CREENLEAF, *Town Clerk.*

WINDHAM, *February*, 1833.

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Upon this case, the County Court decided in favor of Dummerston, that the said pauper was duly removed. To which decision the town of Jamaica excepted, and the case passed to the Supreme Court for revision.

After argument,

The opinion of the Court was pronounced by

WILLIAMS, J., after stating the facts. The pauper was settled in Jamaica, and was duly removed, unless she gained a settlement with her husband by her residence in Brattleborough. And this brings in question the validity of the warning set forth in the case.

In relation to warnings, a strict compliance with the provisions of the statute has always been required. If in the decisions which have been made on this subject, the Court at times have appeared to be almost hypercritical, it has resulted rather from the scanty provisions of the statute than from any desire to decide questions arising out of it by any rules different from those which are adopted in other cases. It has frequently been supposed that all which was necessary to render a warning void, was to find some departure from the letter of the statute in the warning, or proceedings thereon, however immaterial it might be. But this statute, like all others, must receive a rational construction, and when there has been a compliance with it, an immaterial and unintentional deviation from the letter of the statute ought not to vitiate the proceedings under it. The questions which have arisen and been decided under this statute, have principally been in relation to the service; and it will be found that in no case has the service of a warning been adjudged to be defective unless the same service would have been bad on a writ of summons.

In this case, objections have been taken to the warning, and the proceedings thereon. It is claimed that the warning is bad because it does not conclude in the words of the statute, "Hereof fail not, *but of this precept*," &c. But we think the warning is good enough in this particular. In all the various forms of writs which are given in the statute, the conclusion is usually stated in the same words as in this statute; but in practice it has never been considered essential. The words "Hereof fail not," are frequently

omitted. "Have you then there this writ," &c.—"Of this writ, with your doings herein," &c. are frequently the words made use of in this part of a writ. It is only a command to the officer to make due return of his doings on the writ.

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The warning in this case contained that command, and we do not consider there was any material departure from the statute in adopting the particular words made use of.

The return of the Constable has also been objected to. It is true there is no return as to the wife of Oliver Teft, named in the warning; but if it was regularly served on him, it is sufficient. It was not necessary to make a separate service or return as to her. We think the return shows an exact compliance with the requirements of the statute. The teturn says, "served this summons by leaving in the hands of Teft.—A true and attested copy of the same, with my return thereon endorsed." Leaving a copy in the hands of a defendant, is certainly the same as delivering such copy to him: and the words, "with my return thereon endorsed," cannot be tortured to mean any thing else than the return on the original process endorsed on the copy.

It requires no intendment or forced construction of the words, to bring this literally within the statute; but it will require a strong intendment & a violent perversion of the words to give to this return any meaning inconsistent with the idea of the officer's having particularly complied with the requirements of the statute.

There may be some question whether the constable should not have described the person named with more certainty, by saying 'the said,' or 'the within named Oliver Teft.' This caused us some doubt at first; but on reflection, we are convinced they are wholly without foundation. The precept was to warn Oliver Teft, residing in Brattleborough. It was served in Brattleborough, on Oliver Teft. It is not to be intended or presumed there was more than one person of that name. And there can be neither doubt nor uncertainty but what the person named in the precept was the person served therewith, unless evidence had been introduced to show that there was more than one person of that name residing in the town.

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The objection taken that it does not appear that the warning, with the Constable's proceedings thereon, was returned to the Town Clerk of Brattleborough, and by him recorded, appears to us to be without any foundation.

It is made the duty of the Constable to return the precept to the Town Clerk, and it is made the duty of the Clerk to record the same. If the warning, together with the return thereon, are found in the Town Clerk's office, recorded in the book of records of the town, with the certificate of the Clerk of its being received for record, and recorded, it is all which can be required. This might have been shown, by bringing into Court the book of records, and it sufficiently appears by the certified copy of the record, which was read in evidence on the trial of the case. Indeed, the Clerk, Mr. Greenleaf, who certified the copy of record read in evidence, is the same person who received and recorded the original warning, and we cannot disregard the plain dictates of common sense by affecting to have any legal doubts whether Mr. Greenleaf, who received and recorded the warning, was Town Clerk of the town of Brattleborough.

The judgement of the County Court must be affirmed

Bradley & Miller, for Dummerston.

Ransom, for Jamaica.

SAMUEL HENRY VS. THADDEUS COLMAN.

WINDHAM, *February*, 1833.

A promissory note given on condition to be in force on the happening of contingency, cannot be sued before that contingency happens.

This was an action of *assumpsit* on note dated October 18, 1820, for the sum of fifty dollars, with interest, payable in six years from date, signed by the defendant, on which note was written the condition as stated in the opinion of the Court. Plea, *non-assumpsit*, and issue to the jury.

The plaintiff read the note to the jury, and there rested his case.

The defendant then read a deposition from Oliver Smith, which is made part of the case, and there rested his defence.

The note of $2200, mentioned in said condition, was

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treated by all as the one mentioned in Smith's deposition, the substance of which is included in the opinion of the Court.

The plaintiff contended that the condition on the note only provided for such time and expense (exclusive of the amount of the note itself) as the defendant should be put to in paying the said note to Oliver Smith; but did not relate to the money that the said Thaddeus and Hull might pay to said Smith as principal and interest of the note.

The defendant contended that the condition on the note related to the money that said Hull or Thaddeus should or might pay on the note to Smith, and also, to the time and expense in paying the same; and as the deposition showed that they, the said Hull and Thaddeus, paid the note when it became due, that the payment aforesaid should be treated as payment of the note of $50, described in the declaration; and the Chief Judge so instructed the jury, who found a verdict for the defendant.

To this charge of the Judge the plaintiff excepted.—Whereupon, the case comes here for revision.

The opinion of the Conrt was pronounced by

BAYLIES, J.—The bill of exceptions in this case, shows, that *Hull Nims* and *Thaddeus Colman*, on the 7th September, 1820, gave their joint and several note, promising to pay *Samuel Henry*, or order, $2200 in five years from the first day of April then next, with interest annually; also that this note was endorsed by Henry to *Oliver Smith*, who paid Henry the full amount of the note in money.

Moreover, the bill of exceptions shows, that on the 18th October, 1820, *Thaddeus Colman* gave his note to *Samuel Henry* to pay him $50 in six years from date; and upon this note was written, "The condition of this obligation is such, that if *Samuel Henry* shall well and truly pay a note signed by *Hull Nims* and *Thaddeus Colman*, payable to *Oliver Smith*, of Hatfield, for the sum of $2200, in five years from the first of April next, with interest, dated September, 1820, then *this obligation to be in full force.* But if the said *Hull* or *Thaddeus* shall expend any time or money in consequence, then so much to be deducted therefrom."

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Henry vs. Colman.

Samuel Henry has brought his action against *Thaddeus Colman* on this $50 note, and we are called upon to settle the rights of the parties. It is obvious, that by the condition annexed to the $50 note, *Samuel Henry*, if he paid the large note of $2200 to *Oliver Smith*, was entitled to collect the $50 note of *Thaddeus Colman*, except what should be deducted from said $50 note for time or money expended by said *Hull* or *Thaddeus* in consequence of their having signed the $2200 note.

If the $50 note was to be in force on *Samuel Henry's* paying the large note of $2200 to *Oliver Smith*, (and this *seems* to be the condition) then Henry, before he can collect the $50 note, must show that he has paid the $2200 note; for it is on such payment only, that the $50 note is "*to be of full force.*" And it is to be inferred from the condition of the small note, that if Henry did not pay the large note, the small one was not to be in force. The deposition of *Oliver Smith* shows, that *Nims* and *Colman* paid the large note; therefore Henry can have no claim on the small note.

We consider this construction to be the meaning of the parties to the $50 note, which should be carried into effect.

Judgement of the County Court is affirmed.

Roberts, for plaintiff.
Kellogg, for defendant.

David Leavitt vs. Dexter Holbrook.

Windham, *February*, 1829.

Leavitt vs. Holbrook.

Fresh beef killed in the month of December, is liable to be seized and sold on execution.

Dictum. **Property perishable in its nature, or liable to suffer serious diminution by keeping or removal, may not be liable to be taken on legal process.**

This was an action of *trespass* for taking 600 pounds of fresh beef, one raw cow's hide, and 100 pounds of raw beef's tallow. The cause went to the jury on the general issue.

The plaintiff proved, on the trial, that he was the owner of a fat cow, which he had killed and dressed, and that the defendant seized the carcase entire, before it was dissected, and also seized the hide and tallow, all in their raw state.

The defendant shewed, in justification of the taking, a proper writ of execution, on which the property was seized by him as Deputy Sheriff, and the return thereon—to which no exception is made.

The counsel for the plaintiff requested the Court to charge the jury, that the property mentioned in the declaration being of a perishable nature, was not liable to execution. The Court refused so to charge, but charged the jury "that there had been no decision in this State, that perishable property was not liable to attachment and levy of execution. It would seem difficult for them to find this perishable property, taken at the season of the year it was, when in fact, the avails of the cow at auction exceeded forty dollars.—That a case might exist in which the attachment of particular property would be its certain destruction, as if a thousand bushels of potatoes should be attached in the spring, upon a writ returnable the September following.—But, the difficulty in that case does not exist in the present.—Here the property was levied upon in December, by virtue of an execution, and sold in about fourteen days, and there is no pretence that it in fact perished in the mean time. The Jury would therefore consider this property liable to be levied upon and sold as the plaintiff contends has been done by the defendant in the present case." To which opinion and charge, the plaintiff's counsel having excepted, the case was ordered to this Court for further adjudication.

WINDHAM, *February*, 1829.

Leavitt vs. Holbrook.

Kellogg & Field, for plaintiff.—1. The right to seize the goods and chattels of the debtor in execution, is confined by the provisions of the statute to such goods and chattels as may be "*removed*," "*safely kept*," for fourteen days, restored to the debtor, or "*sold*."

Accordingly, bonds, bills and notes are "*goods and chattels*;" but are not subject to execution, because they cannot be "*sold*."—Doug. Rep. (Ld. Mansfield.)—East. Rep. (Kenyon.)—4 Mass. Rep. 438.

Goods and chattels perishing within fourteen days are not subject to execution, because they can neither "be kept for fourteen days," "restored," or "sold."

2. It is an essential requisite to all property which is pledged, that it be of such a nature that it can be restored in the same plight and condition as when received.—Hammond's N. P. 374.

Property taken in execution under the statute is holden as a pledge, because it is to "*be kept until the debtor satisfy the execution*," and only to be sold in the event of the debtor's *not redeeming*.—See also 2 Mass. T. R. 519.

Hides in a vat are not subject to execution.—7 Mass. R. 123.

Officer cannot tan hides—same case.—Also Croke's Eliz. 783.

Bradley & White, for defendant, contended, That beef is not exempted from this rule on the ground of being perishable, that the cases evidently apply to chattels, injured by removal, as green hides in the vats—unburnt bricks.—7 Mass. R. 123.

Whether perishable or not, even in the state in which attached, depends on circumstances; and it does not appear that they were such as to induce material alteration.

2. That the article in the country is annually killed and cut up for sale, and if this is done by the officer, the damage is no more than moving hay in the barn. Yet meat in the carcase, in this State, is a marketable article, and is frequently sold and bartered in this condition.—11 Mass. 184, *Campbell* vs. *Johnson*.

The opinion of the Court was pronounced by

PADDOCK, J.—This case is quite new; and it is not with-

out some hesitancy that the Court have come to a determination upon it. The cases cited by counsel do not furnish any established principle within which it would be proper to range it.

It appears that the plaintiff had killed a fatted beef, and while the same was on the slings, the defendant being a Deputy Sheriff, levied an execution upon, and sold the same; and the question now submitted is, whether beef on the slings, is subject to the levy of an execution. Our practice of attaching property on *mesne process*, is a thing unknown at common law, and is a right given by statute; between which and distress at common law, there is a strong analogy: the former having for its object the securing of a fund out of which to satisfy the plaintiff's judgement, should he recover: the latter, to compel the personal appearance of the defendant in Court, or the performance of some duty.—Co. Lit. 47, *a. b.*—3 Black. Com. 9 and 10.

But in no case could property distrained be sold in satisfaction of the duty or demand, and after the appearance of the person, or performance of the duty, it was returned to the distrainee. But at common law, there was no property privileged or exempt from being taken on an execution or *fieri facias* and sold.—3 Salk. 136.—1 Burr. 579.

It will be found, that with a few exceptions, as tools, &c. no property was exempt from distress at common law, except such as necessarily would perish or suffer diminution. Hence, hides in vats could not be distrained, because, if exposed to the air and dried during the process of tanning, they could never afterwards be reduced into leather; and for that reason, it was held in *Bond* vs. *Ward*, 7 Mass R., that hides thus situated, were not attachable on *mesne process*. Grain in the stack was not liable to distress, because, the quantity would necessarily be diminished by a removal; but should the landlord find it upon a cart, he might distrain and drive it away.—Co. Lit. 47, *b.*

But there may well be a distinction between property perishable by removal and that which is perishable in its nature. If grain could be removed without waste, or hides raised from the vats and becoming dry, could be returned again, and the tanning completed, the objection to dis-

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training them would cease. But such is not the case.—Property, whether perishable or not, may depend upon many circumstances, such as the season of the year; for in the spring, vegetable roots, the growth of the previous year, would soon perish; but in the fall season, they might not be considered perishable; and in warm weather, fresh meat will perish shortly; whereas, it is common with every family, to keep it through all the cold season in a frozen state.

The objection to attaching property perishable in its nature, upon *mesne process*, does not apply with equal force to an execution. Our statute requiring but fourteen days between the levy and sale, there is very little danger of property perishing in the cold seasons, properly taken care of; and if an instance should occur wherein property thus taken should suffer partial or total decay, the occurrence would be so very rare, that it would be far better for community to pass it by unnoticed, than to say that articles having a real intrinsic value in them, should not be taken on execution, because, being perishable in their nature, a loss, by possibility, might be sustained.

In the present case, the beef was attached in the month of December, a season when warm weather is not to be expected, and the sale in a reasonable time after.

With this view of the case, the Court affirm the judgement of the County Court.

Judgement affirmed.

JOHN ANDREWS vs. RUFUS CHASE.

WINDHAM, *February*, 1833.

In an action of *trespass de bonis asportatis*, if the defendant took the goods as highway surveyor, it is sufficient to set forth in the plea the authority for the taking.

If the authority was abused so as to make the defendant a trespasser *ab initio*, such abuse must be set forth in the replication.

If the defendant, in his plea, set forth such facts as shew that he is a trespasser *ab initio*, the plaintiff may demur; but he is not to be so considered because he omits to state in his plea a regular course of proceedings with the goods after taken.

A highway surveyor duly elected and sworn, is competent to discharge the duties of the office, although it does not appear on record that he was sworn.

A justice of the peace is authorized to administer the oath of office to a town officer out of town meeting.

In collecting a highway tax, the surveyor, after giving three days notice to the person assessed, may, on his neglect, levy and collect the tax by distress.

In a plea of justification under a warrant for the collection of a tax, it is sufficient to state that the warrant was *directed* to the surveyor by a justice of the peace, commanding him, &c. without averring particularly that it was signed by the justice.

This is an action of *trespass de bonis asportatis*. The defendant plead in bar a justification on the ground that the goods were taken by him as surveyor of highways, for the satisfaction of plaintiff's road taxes.

To this plea the plaintiff demurred specially, and assigned the following causes, to wit:

1st, That it appears, from the said plea, that the said Rufus Chase, was sworn faithfully to perform all the duties of surveyor of District No. 26, in all things according to law, on the 17th June, A. D. 1831, by a justice of the peace in and for said County of Windham, and not by one of the selectmen or town clerk of said town of Whitingham, as he ought to have been—a justice of the peace not having authority to administer oaths to town officers after the meeting at which they are chosen is dissolved.

2d, That it does not appear from said plea that said Rufus Chase was at all, faithfully to discharge the office of highway surveyor, only to perform all the duties of surveyor of District No. 26.

3d, That it does not appear from said plea that the said Rufus Chase was sworn at all, faithfully to execute and discharge the office of highway surveyor, of any

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district in the town of Whitingham, while both plaintiff and defendant were inhabitants of said town of Whitingham.

4th, That it does not appear from said plea that the said Rufus Chase was sworn faithfully to execute, or to a faithful discharge of the office of highway surveyor for any highway district for the year commencing on the fifth day of May, 1831, or any other period of time—that being time in which he attempts to justify the taking of the property mentioned in the plaintiff's declaration.

5th, That it does not appear from said plea that the said Rufus Chase was legally chosen highway surveyor of *any highway district* in the town of Whitingham, at said annual March meeting, in the year 1831.

6th, That it does not appear from said plea, that at the time mentioned in the plaintiff's declaration, there was any record made in the town clerk's office in the town of Whitingham, that the said Rufus Chase was duly sworn to a faithful discharge of the office of highway surveyor of District No. 26 in the town of Whitingham, for the year commencing on the first day of May, 1831.

7th, That it does not appear from said plea, that at the time mentioned in the plaintiff's declaration, there was any certificate filed with the town clerk of the town of Whitingham, certifying that the said Rufus Chase was duly sworn faithfully to execute, or to a faithful discharge of the office of highway surveyor of highway District No. 26, in said town of Whitingham, for the year commencing on the first day of May, 1831.

8th, That it does not appear from said plea, that the said Rufus Chase, in the capacity of highway surveyor for District No. 26 in said town of Whitingham, for the year commencing on the first day of May, 1831, and after the refusal of the said John Andrews to work out his taxes or rates, as alleged by said plea, gave the said John Andrews six days notice of the sum at which he was assessed in the rate or tax bill mentioned in said plea, and of the time and place he would attend to receive said rates or taxes before making the distress mentioned in the defendant's plea.

9th, That it does not appear from said plea, at what time

the warrant mentioned in said plea was issued by said justice, or that the same was then in force.

Joinder in demurrer.

Roberts & Kellogg, for plaintiff.—1st. It is hardly necessary to remark, that under these pleadings the plaintiff can avail himself of every *substantial* defect in the defendant's plea, and of every defect of *form* which is specified in the demurrer.—1 Chitty, 642.—1 Saunders, 337, *b. n.* 3.—Tidd's Practice, 641.

2d. It is insisted that if the first taking of the property was legal; yet if it appears that the subsequent proceedings of the officer, in relation to the property, were not legal, it constitutes him a trespasser *ab initio*.—7 Mass. R. *Purrington* vs. *Loring*, 338.—7 do. *Winslow* vs. *Loring*, 392.

3d. It does not appear by the pleadings, that the defendant was ever sworn as required by law; and without which, he could not legally act.

4th. It does not appear from the pleadings, that the property was ever advertised, as required by law.—Statute, 430, Sec. 7—do. 401, Sec. 4.

Wm. C. Bradley, for defendant.—Although a special demurrer attaches to matters of form, yet if the plea contains sufficient to amount to a defence, the demurrer shall not prevail: and in setting up the defence, it is enough, certainly, if it is done to a common intent.—1 Chitty, 236, 513.

The defendant contends, that there is sufficient matter averred with such certainty as to meet the causes of demurrer; for,

1. The Justice is expressly authorized to administer the oath generally to town officers [Stat. 411, § 9]
2. "faithfully to perform all the duties of highway surveyors," is equivalent to "faithful discharge or execution of the office,"
3. the district No. 26 having been repeatedly before set up as in Whitingham, and the parties inhabitants thereof, the defendant could not be *highway surveyor thereof*, unless it was a highway district; and when it is said that he was sworn as surveyor of district No. 26, it must have reference to the subject matter.—

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Besides, on a fair construction of Stat. 429, § 6, & 431, § 9, he could not have been appointed to a district in which he did not reside; and therefore the oath would be good for that dtstrict, and that alone.

4–5–6. The choice at the annual March meeting is averred certainly: the commencement of the office arises from the intendment of law, [Stat. 434, § 20] and need not be stated. An oath to discharge *all* the duties of an office, is an oath to discharge them while his office continues.

7–8. Neither record [Stat. 411, § 10] nor filing certificate [Stat. 412, § 11] are made pre-requisites of acting in the official capacity; although the neglect of the latter may involve a penalty.

9. The sameness of proceeding [Stat. 430, § 7] between constable and surveyor, extends only to *levying* and *collecting*—not to the time of demand, which is expressly made different.—[Stat. 401, § 3. Stat. 429, § 6.

10. Where the warrant is not set forth in the very words of the Statute, [Stat. 429, § 6] the particulars thereof are accurately set forth.

11. The proceedings posterior to 1st February, 1832, which is the time laid in the declaration, are surplusage, and need not be examined.

The opinion of the Court was pronounced by

WILLIAMS, J.—This is an action of *trespass* for taking goods. The defendant pleads in bar a justification that he took the goods as highway surveyor, to satisfy a highway tax which he had against the plaintiff to collect. To this plea there is a special demurrer.

As the plaintiff complains only of an illegal taking, and does not complain of any farther illegal act of the defendant, either as a distinct injury, or as matter of aggravation, if the plea shews a sufficient authority for the taking, it is all that can be required.

If a defendant relies in justification of á trespass either on an authority in law or in fact, it is sufficient to set forth this authority in his plea. If by an abuse of an authority in law, he becomes a trespasser *ab initio*, or if an authori-

ty in fact is exceeded, so as to be no justification for what was done further than the authority warranted, such abuse, or such excess, must be set forth in a replication.

A defendant may, however, in his plea, set forth such proceedings on his part, as will shew him to be a trespasser *ab initio*. As if in justifying the taking on an execution or warrant, for the collection of taxes, he should state that he sold the property taken at private sale, the plaintiff, to such a plea, might demur, and it would not be necessary to point out the abuse by a replication. But if in stating his proceedings after the taking he neglects to state those steps which he ought to have taken in order to render his proceedings regular, it is a mere omission; and as it was not necessary for him to set forth any thing more than would justify the taking; so if he neglect to state his after proceedings, or does state them defectively, he is not on that account to be treated as a trespasser from the beginning.

If the defendant was justified in taking the property of the plaintiff to satisfy the tax in question, the plaintiff cannot treat him as a trespasser, because he has omitted to state a regular course of proceeding with the property after the taking. This answers the objection to the regularity of the sale, made on the ground that the defendant has not set forth that the property was duly posted, or that the place where sold, to wit, the store of A. & C. Austin, is not described as a public place, and disposes of all the objections to the plea under the general demurrer.

Our attention is then called to the objections to the plea particularly pointed out, and without examining them numerically, they will all be considered by examining the law in relation to the appointment and duty of highway surveyors. The selectmen must divide the town into districts, and a surveyor for each district must be appointed by the town. When appointed, the surveyor must take the oath required, and then is competent to act as such, and to do all the duties required of him by law. This oath may be taken before the town clerk, one of the selectmen, or a justice of the peace. The authority to administer the oath is expressly given by the ninth section of the act regulating town meetings, &c. Without any such

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authority, the judicial character of a justice of the peace would authorize him to administer this oath. When the person appointed to any office is not present, it is made the duty of the selectmen to cause him to be notified to appear and take the oath. The form of this notice contemplates that the person is to appear before the town clerk or one of the selectmen; but we have no doubt that if the person appointed voluntarily and without compulsory process submits to take the oath, he may do it before the town clerk, one of the selectmen, or a justice of the peace; and that the authority given in the section of the statute before mentioned, to a justice of the peace, to administer the oath of office, authorizes him to administer it as well out of town meeting as in. When the officer is sworn at any other time except in town meeting, and before any other officer than the town clerk, it is then his duty to file a certificate of his being so sworn, with the town clerk, or he subjects himself to a penalty, and also to the inconvenience of proving that he is sworn, if at any subsequent period it becomes necessary; but still he is competent to act when sworn, and he may prove that he is sworn by other evidence than by the record. The duty of a highway surveyor in collecting a tax, is clearly defined by statute. As the tax may be paid in labor, he must give each person taxed three days notice before the time for doing the work (Sec. 6 of act relating to highways.) If not paid in labor, he may then levy and collect in the same manner as constables are directed to collect state taxes.—(Sec. 7.)

In the levying and collecting state taxes, the constable must give six days notice to each inhabitant or resident in his town, taxed in the assessment or rate-bill, of the amount of the tax, and of the time and place when he will attend to receive the same, before he can levy the same by distraining goods or chattels. By comparing the two statutes, it is apparent that in the one case, as the tax is to be paid in labor, a demand or notice of only three days is required; and in the other, a demand of six days is required. In both cases, it is a demand of payment; in labor in one case, and in money in the other. A neglect to pay, equally subjects the person owing the tax to a distress to com-

pel the payment. It cannot by any possible construction of the statute, be considered as the duty of a highway surveyor, first to demand the payment of the tax in labor, and after three days again demand payment in money, and then wait six days further before he can proceed to levy on property to enforce the payment of the tax.

This general view of the duty of a surveyor of highways, answers several, if not all the objections which are raised to the defendant's plea of justification, by the special demurrer. There were some further objections urged in the argument, which may require a brief notice. It was said that the plea does not set forth that the defendant was sworn to the faithful discharge of the office of highway surveyor of any highway district in Whitingham; but as the plea does state that the defendant was appointed surveyor of district No. 26 in Whitingham, and states that he was sworn faithfully to perform the duties of surveyor of district No. 26, it must be understood to be the district before mentioned, and of course, a district in the town of Whitingham.

It is also contended, that it is not stated in the plea, that the warrant to the defendant for the collection of the tax, was signed by the magistrate, Amos Brown; but, as it is said a warrant was annexed to the rate-bill directed to the defendant as surveyor, by Amos Brown, a justice of the peace, commanding him to levy and collect, &c. it implies that the warrant was issued and directed in the manner in which they are usually issued and directed, and of consequence that it was duly signed and directed in the usual way.

The Court consider that the defendant has sufficiently set forth in his plea, his appointment as surveyor of a regular highway district in Whitingham—that he was duly sworn as such—that he had a tax-bill and a warrant duly issued thereon, commanding him to collect the same—that the plaintiff was assessed in a sum of money for a highway tax—that the defendant demanded the tax in labor, or gave the plaintiff the regular notice to work out the same, and on the plaintiff's neglect and refusal to pay the tax, the defendant, by virtue of his tax-bill and warrant, and to enforce the payment of the tax, seized and took the property, for the taking of which, this action is brought. This

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justifies the taking, and entitles the defendant to a judgement. The plea in bar is adjudged sufficient, and The judgement of the County Court must be affirmed.

Moses Bryant vs. George L. Gale.

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Although an accord without a satisfaction is no bar to an action, yet a contract under seal between the maker and payee of a promissory note, by which one covenants to deliver and the other to receive certain property in payment of the note, gives to the latter a new remedy upon a valid contract, and is a bar to an action on the note.

This was an action of *assumpsit*, containing several counts, to which several pleas were filed, and among others the following:

The said Gale says, that the said Bryant, from having and maintaining his action thereof against him, ought to barred; because he says, that by a certain covenant or agreement in writing, signed by the said Moses Bryant, and by the said Gale, and sealed with their seals, and duly delivered on the day of the date thereof, and dated the 17th day of November, 1828, it was mutually agreed by and between the said Moses Bryant and the said George L. Gale, that the said George L. Gale should, on or before the first Tuesday in December, then next, deliver to the said Moses Bryant a certain horse, called the John Hatch horse, sound, and in as good condition as when the said Bryant saw him at Chelsea, in full satisfaction of the said several promises in the declaration of said Moses Bryant mentioned, and in full satisfaction of all damages sustained by reason of the non-performance of the said several promises, and of all costs in the said action, and that the said Moses Bryant should accept the said horse if delivered to him before the said first Tuesday in December aforesaid, in full satisfaction of the said several promises, and of all damages occasioned by reason of the non-performance of the said several promises, and of all costs which had accrued in the said suit; and that on such delivery of the said horse, the said Moses should give up to the said George the said notes to be cancelled, and that the said suit should be no further prosecuted; and that in case said Gale did not deliver said

horse to said Bryant, by said first Tuesday in December then next, that said suit should not be withdrawn, but should be entered and stand for trial at the said Court, as by the covenant and agreement now here ready in Court to be shown appears: and the said George L. Gale avers, that before the said first Tuesday, viz. on the 25th day of November aforesaid, at said Plainfield, he, the said George L. Gale, did offer to deliver and tender to the said Moses Bryant the said horse, sound, and in as good condition as when said Bryant saw him in Chelsea, & the said Moses Bryant did then & there neglect and refuse to receive the said horse: all which the said George L. Gale is ready to verify.—Wherefore, he prays judgement of the Court here, whether the said Moses Bryant, from having and maintaining his said action thereof against him, ought not to be barred, and for his costs.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The County Court adjudged the plea insufficient; from which judgement the defendant appealed to the Supreme Court.

Leland & Collamer, for plaintiff, cited 1 Bac. Ab. 44.—Story's Pl. 175 (notes.)—1 Ld. Ray. 122.—5 John. R. 336, *Watkinson* vs. *Inglesby*.—2 Chit. Plea. 434.—5 T. R. 513–141.—3 John. R. 243–4–5–6–7–8.—2 H. Black. 318.—Cro. Car. 193.

From the review of all the authorities, it is clear,

1st, That an *accord*, as a substitute for a prior contract, to be performed at a future day, is no bar till *executed*.

2d, That it must be in full satisfaction, and so received by the party, or plaintiff, or it is no bar; but a *nudum pactum*.

3d, That an accord must be complete, affording mutual remedies on such agreement, or it is no bar, and is without consideration and void.

4th, That it must appear to the Court, when such agreement is pleaded in bar, that an action will lie thereupon for the plaintiff; for the defendant shall not take away the plaintiff's present action and not give him another upon the agreement pleaded.

5th, That there must be an acceptance of the thing

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stipulated to be done, or it is no satisfaction, and cannot be pleaded as such.

6th, That the thing to be performed at a day to come, a tender and refusal is *not sufficient without an actual satisfaction and acceptance.*

7th, That a plea of collateral matter on a substituted agreement must allege a full satisfaction, or it is defective in point of form.

8th, If the agreement is relied upon as a satisfaction of the prior debt, then the pleadings are defective for the want of such an allegation; but if the agreement is relied upon as not being complete, but depending upon some future acts of the parties, then it is simply an accord without satisfaction, which is equally bad.

There is evidently a distinction in the books between contracts for the delivery of specific articles, and an agreement in satisfaction of a prior contract.

1st. The former being for the payment of specific articles, a tender according to the terms of such contract, and a refusal, may operate as a discharge of such contract. But

2d. The latter being for a contract, which is perfect & complete, the substitution must be equally so, and in full satisfaction, and so accepted by the party; for the law will consider the substitute as perfect and certain as the original contract, and with as perfect and complete remedies for the parties, or it can be no bar.

Marsh & Hubbard, for defendant.—The question arising upon this record is whether a bond or contract under seal, for the delivery of a certain horse, and a tender of the horse, according to the terms of the said contract, is a discharge of a precedent simple contract.

1st. It is objected that this is an accord, which is not a discharge without satisfaction. And it is admitted that a mere accord without satisfaction, is not good; but it is because such a contract is *nudum pactum.* But if made on *good consideration*, the contract substituted, if accepted in discharge, is binding, and a discharge, without its being executed.—1 Ld. Ray. 122.—Cro. Eliz. 304, 305.—2 Henry Black. 317.—*Fitch* vs. *Sutton*, 5 East. 230.—*Harrison* vs.

Close & Wilson, 2 John. Rep. 448.—Wheaton 1049. —1 Dane's Abr. 139, Sec. 5.—*Pennel's* case, 5 Coke, 117.—Bac. Ab. 1 vol. 41 and *n.*—1 Stra. 426.—*Blythe* vs. *Hill*, 1 Mod. 225.—1 Com. Dig. 134, (B. 4,) p. 135. ——— vs. *Gale.*—Plowden, 5, 6, 11.— *Case* vs. *Barber*, T. Ray. 450.—*Heathwate et al.* vs. *Crookshanks*, 2 T. Rep. 24.—*Drake* vs. *Mitchell et al*, 3 East. 231, *Seymour* vs. *Minturn*, 17 John. Rep. 169.—*James* vs. *David*, 5 T. Rep. 141.—*Wilkinson* vs. *Inglesby & Stokes*, 5 John Rep. 386, 391, 392.—*Grant et al.* vs. *Shaw*, 16 Mass. Rep. 314.—*Boyd* vs. *Suydam*, 20 John. 76, 78.—*Coit & Woolsey* vs. *Houston*. 3 John. Ca. 243-5-6-9.—16 John. Rep. 86-8.—*Steinman et al.* vs. *Magnus*, 2 Camp. Rep. 124.—11 East. 390.—*Bradley* vs. *Gregory*, 2 Campbell, 383.—5 T. Rep. 513, 517.—1 John. Rep. 34, 37.—1 Bos. & Pul. 289.— 1 Esp. Ca. 135.

2d. When the debt substituted is of a higher nature, the former debt is extinguished.—5 East. 259.—1 Bac. Pl. 9.—1 Bay. 491. See Powell on Contracts, 332-3.

3d. A tender or offer to pay or deliver a specific article, is a discharge of the contract to deliver.—Chip. on Cont. 113.—D. Chip. Rep. 399.—8 John Rep. 474.—2 John Ca. 411.—Day. R. 684, 695.—1 Wils. 117.—1 Salk. 112.—3 Br. Rep. 1663.—3 John. Ca. 243.

4th. And in all cases, if the defence accrue after the commencement of the suit, it may be plead, *puis darrien continuance.*—5 John. Rep. 268, 386 —7 John. Rep. 401.

The opinion of the Court was pronounced by

PHELPS, J.—The plaintiff's counsel have treated this defence as an instance of accord without satisfaction. If they are correct in this, there is no difficulty in the case. There is no doubt that an accord without satisfaction is no bar to the action, and that an accord with tender of satisfaction unaccepted, is no better. The main question in the case however, is, whether this is to be regarded as a case of accord merely, or as an instance of a new and superior contract, superceding and extinguishing the old one.

Great industry has been exerted in examining and presenting the authorities which really do, or are supposed to

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bear upon the subject; but it is not necessary to comment particularly upon the cases cited. The reason of the sale upon which the plaintiff relies is obvious. An *accord* without *satisfaction* is no bar, simply because there is no consideration and no mutuality to support it; because the creditor has no means of obtaining satisfaction by enforcing it, and of course derives no satisfation directly nor indirectly from it. The authorities all put the subject upon this ground. The want of consideration not only appears, but is assigned as the ground of decision.

Much stress has been laid upon the necessity of mutuality in a contract. This term is often used in the books in connexion with 'consideration.' It is difficult, however, to find any distinction in their import. It would be difficult to find any case, where a consideration exists in which there is no mutuality, or a case of mutual legal obligation without a consideration. The terms when applied to this subject are synonymous; the mutuality sometimes arising from a consideration, as in the case of a consideration executed, and the consideration sometimes consisting of mutual obligation, as in case of a contract on both sides executory. If by mutuality is intended a mutual prospective obligation, or mutual remedy, the law does not, in all cases, require it as essential to a contract; although in many cases, like the one in question, the consideration depends upon this mutual obligation—the contract being purely executory.

It is to be observed, that the contract set forth in the defendant's plea is a contract *under seal.* This circumstance supercedes all enquiry into the consideration: The seal imports one. It is necessary neither to allege nor prove it. Moreover, if mutuality be essential, it is sufficient that both parties have bound themselves in express terms under seal---the one to deliver, and the other to receive the horse; and no reason can be assigned, why the contract could not be enforced by either.

It will be seen therefore, that in the first place, there is a consideration, the seal importing one, and the mutual liability of the parties upon their covenant constituting of itself a consideration; in the second place, there is a mutuality----both parties being absolutely and equally

bound. And lastly, that the plaintiff has a full and ample remedy upon the contract pleaded in bar.

This brings the case within the rule laid down in Plowden 5, and 3 John. Cas. 342, that, whenever the new agreement furnishes an adequate remedy to the party, it may be pleaded in bar of the former. Indeed, the cases cited by the plaintiff, go expressly upon the ground that the creditor could not enforce the accord, and of course it could be no bar to his action.

The result is, that neither the sale relied on by the plaintiff, nor the cases cited by him, are applicable here; as neither the reason of the *one*, nor the grounds upon which the *others* were decided, exist in this case.

It may be added, that the term 'accord,' in its strict technical sense, has no applicability to an instrument under seal. It is used to denote an agreement without consideration,---the consent of two parties not ripened into a contract. It is never used with reference to a contract like the one in question; nor can it be, with propriety. Further it is not to be denied, that a tender of the horse by the defendant was all that could be required of him; and that such a tender, if the contract is binding, is equivalent to performance.

It is argued however, that the defendant's remedy is by suit on his contract to recover damages for the plaintiff's refusal to receive the horse. This argument concedes the whole case; for if either party can sustain an action on the contract, doubtless both can. But suppose the defendant adopts this remedy; what should be his rule of damages? The agreement of the plaintiff is to receive the horse in full satisfaction of his notes. The rule of damages would be the amount of the notes.—He would be entitled to be placed in the same situation as if the horse had been received—See *Ferris* vs. *Barlow*, 2 Aik. 106. This being the case, he would be entitled, to prevent circuity of action, to plead the agreement in bar. Some stress is laid upon the stipulation, that if the horse were not delivered, the suit should go on. This stipulation merely furnished the plaintiff an additional security for the performance of the contract—giving him an election if not performed, to sue upon it, or prosecute his suit. The stipulation is mere-

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ly collateral to the contract. But it is difficult to attach any importance to this stipulation, since the contract *was* performed. It certainly affords no reason why the defendant, having performed, is not entitled to the full benefit of the contract. Indeed, it of itself furnishes sufficient evidence of the intention of the parties, that if the contract were performed, the suit was not to proceed.

Finally, the contract set forth in the plea, was a substitute for the original one, and operated to extinguish it, except in a certain contingency. The intention of the parties, that if performed, it should satisfy the cause of action, is apparent. The defendant has done all in his power to perform, and, unless the plaintiff can make out, that notwithstanding his covenant, he was at liberty to treat the contract as a nullity, and refuse to receive the horse, he must submit to the result, that it is in the eye of the law performed, and his debt consequently satisfied.

Judgement of the County Court reversed, and
Judgement for defendant.

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ENOCH LOCKWOOD VS. NOMLAS COBB.

That the fee of thirty-four cents, allowed a justice of the peace for taking a deposition including the caption and certificate, does not include the writing of the deposition.

That, if the magistrate writes the deposition of a witness, he incurs no penalty under the statute of 1821, by taking pay for such writing, beside thirty-four cents for the caption and certificate.

This action came up from the County Court on exceptions to the decision of said Court. The action was bro't for the purpose of recovering a penalty for taking unlawful fees. The statute of 1821, termed 'the fee bill,' provides specific fees for the services of the various officers in the State, and annexes a penalty of ten times the amount any officer should receive above the sum so specified. Among other items, it allows a justice of the peace thirty-four cents for taking a deposition, including the caption and certificate; and says nothing about the writing of the deposition. The case shows, that defendant was a justice of the peace, and took a deposition at the request of the

plaintiff; and wrote the deposition as well as the caption: and demanded and received for the whole, fifty cents.

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This action was brought to recover the penalty for what was received over thirty-four cents. It was brought before a justice of the peace, and went by appeal to the County Court; and came to this Court on exceptions, as by writ of error.

Isaac N. Cushman, for plaintiff.—The only question to be determined in this case is, what is the meaning of the words of the *fee bill* in the statute, "taking deposition including caption and certificate?"

If, by the ordinary rules of construction, words are to be taken in their common acceptation, the expression "taking a deposition," means *writing the deposition.*

If no caption or certificate was made necessary by the statute, there could be no doubt about the meaning of the phrase "taking."

That, by the word *taking* here was meant the *writing of the deposition*, seems too clear to admit of a doubt.

If the word *taking* was not intended to mean *writing*, why did not the Legislature say, "for taking caption and certificate of a deposition, thirty-four cents?"

But the expression is, *taking*, &c., *including caption*, &c. I have uniformly given this construction to this statute; and this is the first instance in which I have heard or known of a *pretence* that an additional fee for *writing* has ever been demanded.

By the 3d section of the act, (see Stat. p. 305) *writing* depositions is not mentioned.

If the *taking* was not intended to include *writing*, it is to be presumed that writing depositions, &c. "six cents for every 100 words shall be allowed" would have been inserted among the exceptions in that section.

But it says, "*records of proceedings, copies, attestations or certificates*, other than those enumerated in this fee-bill, &c., six cents for every 100 words."

The words "taking and including," are, therefore, plainly intended to embrace the whole service of getting the testimony or deposition on paper, in statutory form; & any other construction would give no meaning whatever to the word

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including; and would, it is believed, be a pitiful evasion of the plain meaning of the statute.

If the Court allow this charge, as a legitimate one, they consequently allow it to the party in favor of whom it is primarily taxed in his bill of costs, as a proper item of taxation. For all legal taxable costs should follow suit.

Jacob Collamer, contra.—The only question in this case is, does the expression in the fee-bill, as to justices' fees, "for taking deposition, including caption and certificate, thirty-four cents," include the time and labor of *writing* the deposition?—Stat. 298.

1st. This is a penal action, and the statute must receive a strict construction; and, most clearly, the words of the statute do not include the *writing*.

2d. The statute, in those places where the word *including* is used, proceeds to all particulars, and is to be construed as extending to no others; as, where copy of appeal is regulated.—Stat. 299.

3d. It is unreasonable and unjust to hold the *writing* a deposition as included in this charge; as the same have every degree of length and difficulty, and can have no fixed measure of price.

4th. The fee-bill fixes a price only for *official services;* and nothing else is to be construed as included, unless clearly and expressly named.

The writing a deposition is not an official act. It may be done, and is to be presumed in the law to be done, by the deponent; as it is in his language, and by him signed; or it may be written by another, and is no where required by the justice to be certified as his official act. The *taking*, spoken of in the statute, is the official act of cautioning, examining and swearing the witnesses; and for this official act, together with caption and certificate, the thirty-four cents are given by statute.

5th. If a deposition were written by a deponent, could not a justice, with truth aud propriety, put on such deposition the legal certificate, "The within deposition was *taken* and sealed by up me, —— ——, Justice Peace." If so, the *taking* does not include *writing*.

The opinion of the Court was pronounced by

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HUTCHINSON, C. J.—One question only is presented in this case; and it is presumed, that the practical importance of the principle embraced in this question, occasioned its coming to this Court, rather than the magnitude of the sum in controversy. The question really is this:—whether the sum of thirty-four cents, fixed as a compensation to a justice of the peace for taking a deposition, including caption and certificate, is all that he can safely take, even when he *writes* the deposition. The statute, which was in force prior to November, 1821, used this phrase:—"Taking deposition out of Court, thirty-four cents." There was also a broad sweeping section, relating to matters not particularly named, and giving seven cents for each 100 words, and seventeen cents for a copy of the whole case. Reports were circulated in and about the Legislature, that some magistrates had adopted a practice rather of speculation, in taking depositions.—That some took thirty-four cents for the certificate of the oath and caption, and seventeen cents for the certificate of its being taken and sealed up by him. Others took all this, and added what the writing of the caption which follows the oath would amount to at seven cents for each 100 words. This was the evil to be remedied by the new statute. It is the business of the witness, to write his own deposition, or procure it done. The official business of the justice commences after the deposition is written and signed. He then examines and cautions the deponent relative to the truth of the deposition, and administers the oath, and makes out the certificates and caption. All this is a uniform business, and deserves a uniform compensation; while the writing of the deposition could have no reasonable sum fixed, till its length becomes known. The writing of the deposition is no part of the official duty of the Magistrate. Any other indifferent person may do it as well as the magistrate, even if the deponent is unable to do it himself. If the magistrate does write the deposition, it is as reasonable that he should receive pay for it, as that any other person should receive it.

There is nothing in this case, that shows how long this deposition was; but as only sixteen cents were claimed as received for writing it, we presume that a reasonable sum.

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Indeed, the decision of the County Court embraces no controversy upon that point.

The judgement of the County Court was in favor of the defendant, that the facts proved did not render him liable to the penalty sued for; and that judgement is affirmed.

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CALVIN JOHNSON VS. JOHN TILDEN.

That, if the land sued for is not appropriated or set off to any particular proprietor's right, the plaintiff may recover against one, who has no title in town, on proving a title in himself to the after division of any proprietor's right.

That, whether the plaintiff's title is of a large or small undivided portion of the land, makes no difference. He has a right to oust the defendant a stranger to title, and hold for the benefit of all the tenants in common.

That such title is defeated by defendant's showing himself to have title as tenant in common, unless plaintiff can show an ouster by the defendant; in which case the plaintiff should only recover to be let in as tenant in common.

That defendant's receiving a deed of the whole lot, and taking possession, and claiming the whole in his own right, is a sufficient ouster; and the plaintiff need not prove a demand of possession.

This was an action of *ejectment* for a hundred acre lot of land, being No. 10 in the seventh range of lots in Norwich. There was a jury trial, and a verdict for the plaintiff; and the defendant filed exceptions to several decisions of the County Court upon matters of law, which appear in a long bill of exceptions, allowed by the Judges of the County Court. A principal matter of controversy was, whether this lot No. 10 was vacant land, or had been located to any particular right. The plaintiff contended, that it was vacant land, only as he had pitched upon it his after division to the right of one Samuel Johnson, an original grantee in the charter. The defendant claimed it as already located to the right of one Long, from whom he derived title to himself; and claimed to hold against the plaintiff. The testimony upon this point is of no consequence here: it went to the jury, and they decided for the plaintiff.

In the course of the trial, several questions of law were raised and decided. To understand these, some facts must be stated.

The plaintiff made a title to the after devision of said right of Samuel Johnson, or a part of it, the whole suppo-

sed to be about thirty-three acres. He had made an irregular pitch of this, and some other after divisions, to which he showed no title over, the whole lot.

The defendant showed an ancient deed from Long, an original proprietor, to one Jacob Burton of the whole of said Long's right. Burton, in the year 1793, conveyed to the defendant's father, to whom he is heir, as admitted on trial, this lot No. 10 describing it as the second division lot of said Long's right. The plaintiff, to show Long's second division lot to be elsewhere, produced plans and papers from the Clerk's office, one of which, called *a manuscript*, was objected to, but admitted. It was in the hand-writing of Paul Brigham, a proprietor, and proprietor's clerk, for many years.

Defendant's argument in support of his exceptions.—It is contended by defendant, that, if nothing had been shown on the part of defendant, leaving him an entire stranger to the title, the plaintiff could not have recovered.

1. The very circumstance of the proprietors laying out the first, second and third divisions of Hundred Acre Lots, shows none of these lots were regarded by them as common and undivided land.

2d. The Court erred in admitting the copy of record of the proprietors, purporting to be a pitch of lot No. 10, 7th range to the rights of Samuel Johnson, John Johnson and Jacob Finton.

The paper in question does not sever any particular part of lot No. 10, to each or either of the rights, mentioned in the pretended pitch. This lot, therefore, still lies in common, at least among the three rights.

But when it is recollected, that plaintiff made title to only one half the undivided land belonging to one right, supposed to be 33 1-3 acres, viz: that of Samuel Johnson. That others still own the other rights, for whom the plaintiff had no right, and that the pitch, if it may be called one, does not sever any particular part to the right of Samuel Johnson, which plaintiff owned, the plaintiff is where he was before he pretended to pitch. Plaintiff by the pitch makes no title to any particular part of the lot; and the

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pitch has no effect whatever in the cause. The lot, if it was before common land, remains common land still.—When a piece of land is severed to any particular right the owner of the right has and holds such piece in severalty. Now which part of lot No. 10, by this pitch, belongs to the right of Samuel Johnson, to satisfy plaintiff for his half of the undivided land of that right under his deed?

The plaintiff, then, allowing No. 10, to be common land, has, not by this verdict, recovered according to his right. For, the pitch being nothing, he has only made out a right in common with the other proprietors, and so has not recovered according to his right. Adams on Eject. 186; Stat. 85.

Defendant also gave in evidence a book of records with proof that the same was made between the years 1795 and 1807.

The parties both referred to the fragments of an old book of records which are made part of the case.

The defendant insisted that said book of records was to be preferred as evidence to the said manuscript, in any case wherein they differed.

And that allowing said lot No. 10, to be common land in 1802, yet the title as shown, made the parties tenants in common, and plaintiff having shown no ouster, could not recover.

The Court overruled this ground of defence, on the suggestion that the defendants claim to the exclusive title and possession of the whole lot was an ouster, and that the title set up by defendant would not make him a tenant in common.

It is contended, that the decision of the Court in admitting the pretended survey was wholly wrong.

The Court erred in admitting the paper manuscript, and in the charge giving it a preference to the record.

This is a mere loose paper without date or signature, by whom made does not appear, except from the proof of the hand writing.

The Court charged the jury, that title shown by defendant did not, if the lot No. 10 in 7 range was common land, make defendant tenant in common with plaintiff.

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If it were common land, all the proprietors had an interest in it in common. A deed, therefore, of the lot, from any one proprietor, would convey the interest, which he had in the lot.

The rule is believed to be universal, that when the grantor conveys a larger interest than he owns in the tract described, whatever he may be found to have will pass.

The doctrine, that the tenant by conveying a greater interest than he owns, forfeits the whole, does not apply in this country.

Again the Court charged, that, if the parties were tenants in common, yet the defendants exclusive claim to the title and possession of the whole was a sufficient ouster to enable the plaintiff to recover *according to his right* and be let in *as tenant in common*.

This is believed to be erroneous. The defendant's exclusive claim must be tested by his refusal, on demand, to admit this fellow commoner. Merely being in possession of the whole and having a deed of the whole, defending for the whole when sued, is not sufficient.

But the verdict is for the whole lot.

Argument for plaintiff.—The plaintiff having shown an undivided right in himself, was entitled to recover of the defendant without any proof of severance, until defendant shewed title of undivided lands in town; and therefore the said testimony, as to the pitch was immaterial. But it was only urged, as being sanctioned by acquiescence.

Another question arises as to tenancy, in common and ouster. The plaintiff had shewn title to an undivided share, and claimed, that the lot in question was undivided land in town. The defendant claimed and had a deed of it as the 2d division lot of Lemuel Long. The plaintiff convinced the jury, that the 2d division lot of Long was in another place, and therefore the defendant was as a stranger to this land. But the defendant contends, that, as Burton assumed the whole right of Long, and deeded to defendant's ancestor this lot, as his 2d division, and as in severalty and in fee; that though it did not pass as such, yet Long's undivided right in it passed by the deed. 1st. Now, can such be the effect, when, if so, the covenants of

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siezen and warranty in the deed would not be broken, though made for a whole lot in severalty, if the grantor happened to have a hundereth part in common. 2d. How entirely inconsistent is this with the next view taken, that is, the defendant is in under a deed claiming exclusive ownership in severalty. This is, most clearly an ouster of all others; for possession under such a claim and deed for 15 years would have barred all. Now, is this man to be permitted to say, I am a mere tenant in common and have committed no ouster of my cotenants?—*Pomeroy* vs. *Mills*, 3 Vt. Rep. 410, & authorities on p. 412.

It is apparent, that all the rest of this case is merely an attempt to procure a new trial on the weight of testimony. The defendant has had no testimony excluded, and the plaintiff none admitted, to which there was exception farther than already noticed. He has had repeated and full hearing before the jury, and they have found for the plaintiff, under a charge by the Court, to which there is no exception. Now can he by any ingenuity of counsel, by proceedings as of error, procure a new trial, and thus add to the delays of justice, already so protracted under our system of review,

It may perhaps be suggested, that it is hard the plaintiff should recover on showing title to but part of the lot.—This is nothing to the defendant, who owns no part; and the right to recover in such case is too well settled to be now questioned.

The defendant may say, the plaintiff owning only after-division rights, had no right to question the regularity of the previous divisions. In answer to this, the plaintiff says,

1st. The course taken by the plaintiff in this respect was not objected to on trial.

2d. That the plaintiff did not object to the regularity of the division, but merely showed that the land in question was not included in the division, and was in fact undivided land.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—The Court consider, that the plaintiff made out a sufficient title to this land, if it were then

undivided land, and the defendant were a stranger to all title to the undivided lands in town. It is no matter whether his title extended to half, or any less quantity of the land, if it extended over the whole. That entitled him to recover the whole, and put out the defendant, and take and hold possession for himself and his cotenants in common, whoever and wherever they might be. This is clear in principle; and decision, to that effect, have been often made in this state. The title of each tenant in common necessarily extends over the whole land thus holden in common, and, not only *can* he sue alone, and oust any intruder, but, at common law, he must sue alone.

Hence the practice in England, that each gives his separate lease to some third person, who becomes plaintiff, or sues on the demise of these several tenants in common. In this view there is no importance to be attached to the evidence of the plaintiffs' pitch of this land to the rights, he claimed to own. It was not admitted as of any avail, otherwise, than as sanctioned by the acquiesence of those, who had a right to contest its legality.

With regard to the paper, found in the office of the proprietor's Clerks, called the manuscript paper, which was objected to by the defendant; we consider, that the case does not show sufficiently how this paper came into the office, or why it was there, or for what purpose it was made, or whether it was ever sanctioned by the proprietors, so as to become valid for any purpose, to entitle the plaintiff to read it to the jury. The case shows it not admitted as record evidence; but it was submitted to the jury to decide, from all circumstances in evidence, whether this, or the one differing from it only as to the location of this lot, but which was in the book, used as evidence, was the one, which the proprietors themselves sanctioned as of binding force. Yet the Court consider, that the case does not show sufficient evidence of its validity to admit it to be thus submitted to the jury.

The Court also consider, that the instructions to the jury with regard to the tenancy in common were incorrect, so far as related to the defendant's having no right as tenant in common under the deed from Burton. It appears by the case ,that, when Burton conveyed this lot to Tilden,

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he, Burton, owned the whole right of Long. This included the after division. Now, the Court are of opinion, that, if this lot were not the second division lot of Long's right, yet, if it was undivided land, it was as much subject to Burton's after division, as that of any other right, and that Burton's deed to Tilden conveyed to him whatever interest he had in this lot; which was a tenancy in common, to the amount of his after division. Were the plaintiff's pitch legal, to effect an application of this lot to his after division, it would only make him tenant in common with all those proprietors, who had not obtained their portion of land to supply their after division. Moreover this deed to Tilden was prior to the plaintiff's pitch; and nothing appeared in the case, that the right of Long has ever had its after division. This entitled the defendant to remain in possession, and the verdict most favorable to the plaintiff, under these circumstances, would only admit of his recovering, to be let in as tenant in common with the defendant.

A further question is here raised, whether the plaintiff if all other objections were removed, could recover at all, without proving a demand to be let in as tenant in common, before the action was commenced? We entertain no doubt upon this point. The deed from Burton to Tilden does not convey some undivided portion to hold as tenant in common, but conveys the whole lot as owned in severalty; and describes it as having been severed to the right of Long as his second division. And the defendant has taken possession and holds it thus in severalty; and claims to hold the whole in his own right. This is a sufficient ouster, to render the defendant liable to a suit by his co-tenant, without any previous demand.

On account of the errors, thus noticed, in the decisions of the County Court, and in their instructions to the jury, judgement is reversed, and a new trial is granted.

Marsh, for defendant.

Collamer, for plaintiff.

JOSEPH D. WHEELOCK, Administrator of JOTHAM WHEELOCK, vs. JONATHAN WHEELOCK, Jun.

WINDSOR, *February*, 1833.

That, in a special assumpsit and plea of non assumpsit, it is no objection to evidence offered, that it does not prove a good cause of action, if it proves the special promise declared upon.

That sayings of the plaintiff who sues as administrator, relative to the note in suit, and tending to prove it not due, are not admissible in evidence, unless he refers to something within his own knowledge; and which would be obligatory between him and the estate, he represents.

That a note payable to A. B., guardian of C. D. must be sued in the name of A. B. and not in the name of the administrator of C. D. And, if sued in the name of the latter and there is a verdict for the plaintiff, judgement will be arrested.

That when defendant's motion in arrest is overruled by the County Court, and that judgement is reversed in the Supreme Court, the defendant is entitled to his costs before the Supreme Court, but to no other costs.

This action was brought up from the County Court by exceptions to their decisions. The following is a copy of the Bill of exceptions, allowed by the judges, so far as necessary to understand the points litigated.

This was an action of assumpsit, brought by the plaintiff in his capacity of administrator of Jotham Wheelock, an insane person, deceased, on a note, payable to Ebenezer Wheelock, guardian of said Jotham Wheelock, executed in the life time of said Jotham, and while he was under the guardianship of the said Ebenezer Wheelock.

The cause was put to the jury under the general issue.

The plaintiff to support the issue on his part, offered, in evidence to the jury, a Note, of which the following is a copy, to wit,

"For value received, I promise to pay Ebenezer Wheelock, guardian of Jotham Wheelock, Sixty-nine dollars and twenty-two cents, with use, on demand. Witness my hand this 29th day of May, A. D. 1827, at Cavendish."

(Signed) "JONATHAN WHEELOCK. Jr."

The defendant objected to said note's being given in evidence to the jury; but the Court decided, that said objection be overruled, and, said note was read, as evidence to the jury.

The plaintiff also read as evidence to the jury, the deposition of Ebenezer Wheelock, which shows the execution

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of the note to him, while Guardian, and his delivering the same to Joseph D. Wheelock, who succeeded him as guardian; and that said note was due and belonged to said Jotham.

The defendant, to maintain the issue on his part, offered in evidence to the jury a duly authenticated copy from the probate records of the district of Windsor, showing, that Jesse Spaulding and Joseph Stone were by the Probate Court for said district duly appointed a Committee to take an inventory, and make an appraisal of the estate of said Jotham Wheelock, deceased.

The defendant also offered in evidence, the testimony of the said Jesse Spaulding and Joseph Stone, tending to prove, that in pursuance of said appointment, they took an inventory, and made an appraisal of the estate of the said Jotham Wheelock, deceased, and, that, on that occasion, the said administrator brought forward the said note, and said to the said appraisers, "There is a note against Jonathan Wheelock, jr. which is not to be collected, "but to be given up to him. You may appraise it at something or nothing." And also tending to prove, that the said appraisers did appraise and inventory the said note at only $20. And also, tending to prove, that the said Jonathan Wheelock, jr. was able to pay the full amount of said note, and, that said note would have been good for the full amount thereof, in case it were justly due. To all which the counsel for the plaintiff objected, and the Court decided, that the same be excluded. On the evidence aforesaid, the Court directed the jury to return a verdict for the plaintiff, for the full amount of said note, which they did.

To all which decisions and directions of the Court, the defendant excepted.

The defendant also moved in arrest for the following reasons, to wit. Because it appears by the record in said cause, that the plaintiff has sued in his capacity of administrator of Jotham Wheelock, deceased, and the note, on which his action is brought, is made payable to Ebenezer Wheelock, guardian of Jotham Wheelock.

This motion being overrulled by the Court, the defendant again excepted. Upon these exceptions the case passed to the Supreme Court for revision.

Argument for defendant,—1st. The defendant insists, that the note, on which the plaintiff has brought his action, is a contract between the defendant and Ebenezer Wheelock, and the phrase in said note, "guardian of Jotham Wheelock," is merely descriptive of the said Ebenezer Wheelock, and therefore the action ought to have been brought in the name of the said Ebenezer Wheelock, or, in case of his death, in the name of his administrator, and not in the name of the administrator of the said Jotham Wheelock.—Brayton's Rep. 108; 1 D. Chipman's Rep. 409; 8 Mass. Rep. 162, *Sumner, Adm.* vs. *Thos. & Jos. Williams*; 5 Mass. 299, *Thacker & al* vs. *Dinsmore*.

The administrator represents his intestate in all his personal contracts, and in all causes of action, which accrued to the intestate in his lifetime; but all contracts, made by the administrator respecting the estate of the intestate, are the personal contracts of the administrator, and must be sued in his name, or in case of his decease, in the name of his administrator, and not in the name of an administrator *de bonis non* of the first intestate.

An insane person under guardianship, is as much dead in law, as it regards making contracts, as a deceased intestate.

On all contracts, made by the ward, previous to his guardianship, the guardian must sue in his capacity of guardian; but all contracts made by the guardian, respecting the estate of the ward, are the personal contracts of the guardian, and must be sued in his individual capacity, and not in his capacity of Guardian; and therefore, in case of the decease of the ward, they cannot be sued in the name of his administrator.

Contracts, made by an administrator or guardian, are entirely different from those, made by an agent. An agent represents his principal; and his contract is the contract of the principal; and the agent can make no contract, except where the principal might make the same contract personally; but an administrator can have no principal, for his intestate is dead, and can make no contract; neither can a guardian of an insane person have any principal, for his ward is civilly dead, and can make no contract.

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2d. The defendant further insists, that the testimony which he offered, tended to prove an implied acknowledgment of the plaintiff, that the said note had been paid, or in some other way settled, and was to be given up to the defendant, and therefore ought not to have been excluded from the jury.

3. The defendant further insists, that the testimony which he offered, ought at least to have been permitted to be given to the jury in mitigation of damages.

Argument for plaintiff.—I. The plaintiff insists that the evidence offered by the defendant was properly rejected, from these considerations.

1st. This testimony was entirely insufficient to make out any defence. It as much tended to show a previous assurance of favor, or accord without satisfaction, as any thing else.

2d. If it be insisted on as tending to show previous payment, it is obvious that, taken together it is most clearly the other way; as the plaintiff permits it to be charged to him and accounts for it. The fact of his not accounting for it *in full* is of no importance, as he must hereafter account on collection.

3d. It is contended, that the plaintiff, as administrator, has no power to concede away the rights of creditors, and heirs, especially by such concession as in no way charges himself. He is a mere agent; and this does not fall within his agency. It has not that ingredient, which gives force to a concession, *being without interest*. 6 Mass. Rep. 58, *Foster* vs. *Fuller*; 8 Pick. Rep. 132, *Spraker* vs. *Davis*; Bul. N. P. 237; Salkeld, 260; 6 Con. 170, *Knapp* vs. *Handford*.

II. The other point in exception on trial obviously cannot be sustained; as the note objected to, was clearly as stated in the declaration, and evidently admissible to sustain the issue on trial between the parties.

III. The other point arises on the motion in arrest. The question is, can the plaintiff, as administrator of Jotham Wheelock, sustain an action on this note?

1st. It may be important, here, first to dispose of a class of decisions, on which the defendent has seemed to rely;

that is, all that class of decisions which make administrators, guardians and sometimes other agents personally liable on covenants and engagements entered into for the principals. That entirely rests on the words of such covenant or agreement. Most obviously any man may be holden for another if he so agrees.

2d. There is another class, to wit, promises made to administrators and executors. These must be enforced by such trustees, as no one else could sue; as the contract could not show for whose benefit, whether legatees, heirs or creditors, it was made.

3d. This, by the note and the testimony, is shown to have been the property of Jotham Wheelock. From him the consideration moved, and for his benefit the promise was made, and then *he* might sustain a suit, and, if he, then his administrator. And even if it were true, that the former guardian might have sustained a suit, it does not, therefore follow, that the present plaintiff cannot. 1 D. Chip. Rep. 431.

4th. Had the deceased in his life-time recovered his reason, and been discharged from guardianship, he could have sustained the suit. And, therefore, his administration may, when the guardianship ended by the death of the ward. 1 Chit. Plea. 5, 25.

5th. It should not be holden, that the guardian, by taking a note in this form for the debt of the ward, diverted so much from the fund to his own use, for which he would be at once holden, and to collect for himself; and had the suit been brought even pending the guardianship, it should have been a suit by Jotham Wheelock, *by his guardian*.

6th. This is a contract made with an agent, disclosing his principal at the time, and the suit, therefore, by the principal. 1 Chit. Plea. 25; 1 Boss & Pull. 101, Note B.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—It appears by the exceptions, that on the trial of the issue, the plaintiff offered in evidence just such a note as he had described in his declaration.—The defendant objected to the reading of this note, but it was admitted by the Court; and we think, correctly. The question for the jury to try was, whether the declaration

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was true? This note was direct evidence to prove it. The reasons, urged by the defendant against the reading of this note, are only applicable to show the declaration insufficient.

Again, the testimony, offered by the defendant, was correctly excluded. The plaintiff's saying to the appraisers, that this note must not be collected but be delivered up, did not prevent their appraising it at twenty dollars, which made him accountable for that sum before the Court of Probate. He told no fact, which if true, would make a defence to the note; such as that it was fraudulently obtained, or was paid. He might have heard and believed things as having happened before the decease of Jotham Wheelock, which yet are not true. He is not suppposed to know any thing, not resulting from his own acts, but from those of his intestate. If this administrator had conceded, that he had received the pay on the note, that might be good evidence for the defendant. That would be his own act, and would bind him to account before the Court of Probate. The evidence, offered, would show, that the plaintiff has accounted for the twenty dollars, the appraised value of the note. If he recovers and collects any more, he must account for that also.

We pass to consider the motion in arrest, which is founded upon a supposed defect of the declaration. This presents the question, whether the suit was correctly brought in the name of the plaintiff, as administrator of Jotham Wheelock, or whether it should have been brought in the name of Ebenezer Wheelock. The note was executed in the life time of said Jotham, and while said Ebenezer was his guardian; and was made payable to Ebenezer Wheelock, guardian, &c. Several authorities are cited, that seem to support this declaration. Such are the cases of Corporations, where the Treasurer has been treated as the mere agent of the Corporation, in a suit upon a contract where the treasurer is named as payee. In such cases as that of *Arlington* vs. *Hinds*, the Whitelaw case, and the case in 5th Mass. Rep. the agents may be considered as having exceeded their authority, or stepped aside of their duty in so shaping the contracts, as to make them payable to themselves; and the consideration having passed from

the corporation, they have a right to treat their Treasurers as mere agents, and claim the promise as enuring to the Corporation itself. When the signer promises the Corporation that he will pay to their Treasurer, there is no difficulty. The consideration moving from the promisee, it is natural, in case of Corporations, that the promise to them should be to pay to their Treasurer, who is their agent especially appointed to receive their funds. And, when it is obvious, that the consideration moves from a corporation and the promise is to pay to one, who is merely the agent of such corporation, there is not much fiction in considering this as a promise to the corporation, that the pay shall be made to such agent. Probably a declaration should be so made upon such a contract, to be according to its legal effect.

In ascertaining how far those authorities are applicable to the present case, we must decide whether a guardian is a mere agent, like the treasurer of a corporation. We think he is not to be so considered. He acts upon his own responsibility, he is under bonds to account for all the monies, which come under his care, belonging to his ward. It best comports with legal principles to consider the guardian, in a note drawn like this, as the Trustee, and the legal interest in him; and require the action to be in his name. His name being inserted as payee, the adding the words, "guardian to Jotham Wheelock, does not change the payee, but points out the *certui que trust*. And to him the guardian must render an account, either of the fund paid out on receiving this note, or for the amount of the note when collected.

We need not now decide, whether Ebenezer Wheelock rendered himself liable to account for the fund, by taking the note in this form, or what other circumstances might render him thus liable. This question could not arise where he, acting for his ward, took a note payable to his ward. In such a case, upon a change of guardian, the note might pass to the new guardian, and be sued by him without naming the former guardian. So, in case of the decease of the ward, the note would pass to the administrator, and might be sued by him. And, if any loss should happen by the neglect or unfaithfulness of any guardian,

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the reasonable damages for such neglect might be recovered of him upon his bond.

Suppose a suit had been commenced by Ebenezer Wheelock, as guardian, while he was in fact such, and the guardian should be changed, or the ward should die, and an administrator be appointed, it would hardly be thought of as practicable, for such new guardian, or such administrator, to come in, and be entered as plaintiff to prosecute the suit, thus commenced by the first guardian.

There is no such difficulty, when a suit is commenced by an administrator, and he dies, or is discharged, and another is appointed. In any such case, the new administrator comes in as plaintiff, and prosecutes the suit. Had Ebenezer Wheelock sued this note and died, his administrator could finish the suit for the benefit of Jotham, or his estate.

The judgement of the County Court is reversed, and the judgement to be entered, to dispose of the action, is, that judgement be arrested, and, as the motion in arrest was made in the County Court, the defendant recovers his cost of this term, but nothing more.

Washburn, for defendant.

Collamer, for plaintiff.

Willis Aldrich vs. the Town of Londonderry.

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The obligation on a town to support their poor arises from the Statute alone.

No action can be maintained against a town at the suit of an individual on the general provisions of the Statute declaring it to be the duty of a town to support their own poor, nor will any action lie against them for support afforded to a pauper unless it was afforded at their request, or unless there has been a subsequent promise to pay.

When the overseers of the poor contract with any individual to support a pauper for a year, he is under no obligation to support for a longer period.

If the individual supports the pauper after his year has expired, no action can be maintained against the town therefor, on the ground that they neglected to take the pauper away.

This case came up from the County Court, upon the following bill of exceptions.

"This was an action of assumpsit, brought by the plaintiff, to recover for meat, drink, washing lodging, doctoring, nursing and other necessaries, furnished and provided by the plaintiff, for one Jemima Jerald, a pauper of the said town of Londonderry.

The cause went to the Jury under the General Issue.

It was conceded by the defendants, that the said Jemima Jerald, was a pauper of said town of Londonderry, and, that said town agreed with the plaintiff, to support her one year, ending the 15th day of March, 1831, for $22,00.

The plaintiff, to maintain the issue on his part, introduced, as a witness, Stephen Stoddard, who testified, that in April 1831, Mr. Wait, one of the overseers of the said town of Londondary, came to the plaintiff's house in Ludlow, where the said Jemima Jerald then was, and paid over to the plaintiff, some money, betwixt 10 and $15, for keeping her the previous year; and tried to make a bargain with the plaintiff, to keep the said Jemima Jerald another year; that the plaintiff asked $1,00 per week for keeping her, which Mr. Wait refused to give; the plaintiff then offered to keep her another year for 75 cents per per week. That Mr. Wait refused, and said he was not authorized by the town to give any more, than they had given before, to wit, $22 per year. Mr. Wait then concluded, when the travelling should get to be good, he would come after her.

The plaintiff, then offered to prove, that Wait did then return to Londonderry, and the said Jemima Jerald re-

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mained at the plaintiffs, and, that the said Wait, or any other overseer of the poor of said Londonderry, or any other person on their behalf, did not come after the said Jemima Jerald, until tho 31st day of May, 1831, when a new contract was made with plaintiff for her support; and, that the plaintiff did continue to keep and support the said Jemima Jerald, from the said 15th day of March to the 13th day of May aforesaid.

And the plaintiff, also offered the testimony of Dr. Archabald McEwen, tending to prove, that during said time, to wit, on the 27th day of April 1831, at the request of the plaintiff, he visited the said Jemima Jerald, and administered to her medicine and medical advice; that he found her seriously sick, and in immediate need of medical aid; and, that he charged the plaintiff for the same $1,75, and that the plaintiff afterwards, to wit, on or about the 1st day of October 1831, paid him the same.

The plaintiff also offered the testimony of one Josiah Gilson, tending to prove, that on the said 27th day of April 1831, he was at the plaintiffs in Ludlow, and discovered, that the said Jemima Jerald was very sick, and in need of medical aid, and advised him to send for a physician to attend her, and, that the plaintiff did then immediately send for the said doctor Ewen; and also tending to prove the amount of expense, necessarily incurred by the plaintiff, in sustaining the said Jemima Jerald from the 15th day of March to the 31st day of May aforesaid; but the plaintiff did not offer any other testimony to prove any request from the town of Londonderry to Mr. Aldrich, the plaintiff, to provide for the said Jemima, except as hereafter mentioned.

All which was objected to by the counsel of the defendants, on the ground that there was no evidence, tending to show any request of the town to the said Aldrich, to furnish the said meat, drink, washing, and lodging, doctoring, nursing, or other necessaries to the said pauper; and, that the testimony, introduced and offered, did not tend to prove any promise, express or implied, or any liability on the part of the said town of Londonderry.

The Court decided, that the same be excluded.

The plaintiff then offered the testimony of one Silas

Warren, tending to prove, that Mr. White, one of the overseers of the poor of said Londonderry, acknowledged that the said doctor's bill was due to the plaintiff, from the said town of Londonderry.

Which was objected to by the counsel for said town of Londonderry, and the Court decided that the same be excluded.

The plaintiff then submitted to a nonsuit, with leave to move to have it set aside.

To which decisions of the Court, the plaintiff doth except, and prays, that his exceptions be allowed, and that the cause pass to the Supreme Court for their decision thereon; that the said nonsuit be set aside, and a new trial be granted him.

Washburn, for plaintiff.—1st. The plaintiff insists, that the facts prove an implied request on the part of the said town of Londonderry to the plaintiff, to keep the said Jemima from the said 15th day of March, till they should come after her, and to provide suitably for her support, and also, an implied promise and liability on the part of the said town to pay the plaintiff so much money, as he reasonably deserved to have, for keeping and supporting her during all that time, and especially from the said 15th day of March to some time in April, when the said town tried to make a new bargain with the plaintiff, as aforesaid, and therefore ought not to have been excluded from the jury. Vt. Stat. 370; 1 Chip. Rep. 458; 2 do. 103, *Jamaica* vs. *Guilford*.

2d. The plaintiff further insists, that the said town of Londonderry were legally bound to support the said Jamima, she being a pauper of said town, and, that it appears by the case, that they had made no other provision for her support, from the said 15th day of March to the 31st day of May, 1831, and were therefore under an implied promise and liability to pay the plaintiff, or any other person, who might have furnished her with support, during that time.

3d. The plaintiff further insists that the testimony, which he offered of Doct. McEwen and Josiah Gilson, would have tended to prove an implied request on the part of the said

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town of Londonderry to the plaintiff, to provide for the said Jamima the medical aid, which he furnished, and an implied promise and liability to pay him the sum of money, which he had advanced and expended for that purpose, because it would have appeared by said testimony, that the said Jemima was under immediate necessity of having medical aid, and said town was at considerable distance from the place, where they had put the said Jemima, and could not furnish it in sufficient season themselves; and it does not appear, that they had made any other provision for that purpose, and therefore the said testimony ought not to have been excluded from the jury.

4th The plaintiff further insists, that the testimony of Silas Warren, tending to prove, that Mr. White, one of the overseers of the poor of said Londonderry, acknowledged, that the said Doctor's bill was due to the plaintiff, from the said town of Londonderry, ought not to have been excluded from the jury.

O. Hutchinson & Marsh, for defendants.—This is an action of Indebitatus Assumpsit, in which plaintiff declares in two general Counts.

1st. That defendants, on the 25th day March, 1832, were indebted to the plaintiff in the sum of $20, for meat drink, washing, lodging, nursing and doctoring one Jemima Jerald, a pauper, belonging to said town, by the plaintiff, before that time, found and provided, at the special instance and request of said town—and being so indebted in consideration thereof, promised to pay said sum on demand.

2d. A *quantum meruit* for the same provisions and services. Plea, Non Assumpsit.

At the trial at November term, before Mr. Justice Williams and others, the plaintiff neither proved, nor offered to prove, any request, employment or promise, by the town, or any of its agents, to render said services, or to pay for them when rendered.

And the general question was, whether the plaintiff, without such request, employment or promise could recover. The Court decided, that without such proof, the defendant was not liable.

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It was admitted that Jemima Gerald, was a pauper belonging to Londonderry; and proved that plaintiff had rendered the services mentioned in the declaration.

It is now contended, that this opinion was correct.

The case of Gallup against the town of Pomfret, ruled in this County, some few years since, though not reported is relied on, as directly in point.

In that case, the plaintiff was called by the friends of the pauper, who had been crushed by a falling tree, and needed immediate assistance; and was by the plaintiff trepanned and dressed. The plaintiff continued to attend on the pauper till he was cured. During this time, the overseer of the poor was sometimes present and made no objection, to the employment of the plaintiff; but it did not appear, that the authority of the town, ever directly requested or employed plaintiff, or promised to pay him.—The town it was holden was not liable.

In the case of *Middlebury* vs. *Hubbarton*, it was decided that no action would lie by one town against another town except in cases coming directly within some clause of the statute, creating a liability.—*Middlebury vs. Hubbarton*, 1 D. Chip. Rep. 205.

In the case of *Atwood* vs. *Atwood*, in this Court, which some of the members of the Court may remember, (not reported,) in this County and in this Court it was ruled that no relative of the pauper who had contributed more than his share towards the support of a poor relative, could maintain an action against another relative equally liable for his aliquot-part; and that this whole subject between towns and individuals, and between different individuals, was matter of statutory provision. That there was no common law remedy in such cases, unless the parties had made themselves liable by special contract, and that whoever claimed any redress in such cases must assert his claim on the principles, and in the manner prescribed by the statue.

In the case of *Edwards* vs. *Davis*, in the State of New York, the same principles are recognized and the same decision as in *Atwood* vs. *Atwood*. *Edwards* vs. *Davis* 16 John. Rep. 281.

2d. This is an action of general Indebitatus Assumpsit,

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which will not lie to enforce a cause of action which is within the statute.

In *Middlebury* vs. *Hubbardton*, before cited it was decided that under either section of the statutes the declaration cannot clearly state a case, exhibiting all the facts necessary to bring the case within some one of the provisions of the statute; and that indebitatus assumpsit, would not lie in such case.

And in the case of *Edwards* vs. *Davis* (also before mentioned,) that there is no common law obligation, by which a child is liable to support an indigent parent.

The duty of one relative to support another who is in indigent circumstances, is holden to be an imperfect obligation, which the common law will not enforce, and that the performance of all such duties, can be enforced only by statutory provisions.

If this be so—if a parent cannot on principles of common law, be compeled to support a child after coming of age, or a child a parent, or, if one child cannot be compelled to refund his proportion of what has been expended by another, in the support of an infirm parent; how can it be pretended, that an individual, by his own voluntary act, can impose an obligation on the town or parish, to refund money or pay expences, which he may have incurred without request or promise to pay, where there is not even an imperfect moral obligation on the party?

All such expenditures must be regarded as mere charitable and voluntary acts of kindness, for which no action will lie even against the party benefited, as was ruled in the case of *Bennington* vs. *McGennas*. 1 D. Chip. R. 44.

This was a mere *voluntary* act, for which no action will lie.

It would be extremely inconvenient and vexatious to the towns, if relations and friends of paupers, might provide for them, and create expense at their own discretion without request or employment by the town, and thereby bring the town in debt, and have a right of action for every act of kindness done to those, whom the town must support. 2 East. 506.

The opinion of the Court was pronounced by

WILLIAMS, J.—If the town of Londonderry are liable to the plaintiff, it must be on the testimony of Mr. Stoddard; for if the County Court were right, in considering that this testimony did not tend to prove any contract on the part of the defendant, they properly excluded the other testimony offered, which only proved the performance of the services for which the action was brought and the necessity and value of those services.

No principle seems to be better settled than this, that there is no implied contract on the part of a town, to pay for services, or relief afforded to a pauper, which was not afforded at their special request.

The obligation resting on a town to provide for the poor, is a statute obligation, and may be treated like the obligation of a child to support its parents, or of a parent to support his adult children, to be enforced only in the cases specified in the statute and in the mode therein pointed out. If it was not for the requirements of the statute, and the duty which rests on every citizen to do that which the law requires, there would be no obligation on a town which would be considered as a consideration for a subsequent promise. That there can be no implied contract that a town should pay an individual for affording assistance to those who are destitute, and who are in fact paupers, may be inferred from the nature of the obligation they are under, and appears most abundantly from the cases which have been decided both in England and in this country.

The general provisions of the statute that the overseers of the poor shall relieve, support, and maintain, their own poor (and there is no similar provision in the English statute,) has never been considered as creating an obligation on a town or parish, which could be enforced at the suit of an individual. They judge for themselves, under the order of a Justice of the Peace in certain cases, the nature and extent of the relief which the necessities of a pauper may require. No individual, without their knowledge and consent, can afford the relief and maintain an action of indebitatus assumpsit therefor, however urgent or great may be the necessities of the case. The cases in which this

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doctrine has been established are numerous. The case of *Aiken et al* vs. *Banwell*, 2 East. 505, and *Gent* vs. *Tompkins*, 1 Dow & Ry. 541; *Miller* vs. *Inhabitants of Somerset*, 14 Mass. 396; *Kittridge* vs. *Inhabitants of Newbury*, do. 448; *Edwards* vs. *Davis*, 16 John. 281; *Middlebury* vs. *Hubbarton*, 1 D. Chip. 205; *Jamaica* vs. *Guilford*, 2 D. Chip. 103; *Gallup* vs. *Pomfret*, decided in this County, Aug. Term, 1822; *Washburn* vs. *Vernon Windham*, Feby. 1832, & *Lowell* vs. *Pownel*, Ben. Feby. 1833, are all of them authorities for this doctrine. We think therefore, there is no right in the plaintiff to maintain this action against the defendants, founded on the consideration alone, that Mrs. Jerald was a pauper of the town, was in need of relief, and that he offered her the necessary support, arising either from the common law, or the general provisions of the statute before mentioned.

The next enquiry then must be whether there was any express request, contract or undertaking on the part of the overseer of the poor of the town of Londonderry, which would authorise the plaintiff to relieve, support, and maintain, Mrs. Jerald, and provide for her physicians and medical attendance as her necessities might require, and recover therefor againt the town in *quantum meruit*. And it may be remarked if he can recover for the services rendered, during the time claimed, he might upon the same principle recover for her support to this time, if the overseers of the poor had not taken her away.

Overseers of the poor, are considered as the agents of the town in relation to taking charge of the poor. In the case of all agents, where their authority is particular and limited, they cannot bind their principal further than they are authorised, more especially, when the extent of their authority is known and disclosed. In this case the extent to which the overseer of the poor of Londonderry was authorised, was made known to the plaintiff. It appears that he made known to the plaintiff his purpose in coming to his house, the extent to which he was authorised to contract, and the highest sum he was at liberiy to agree to pay, and this sum was twenty-two dollars a year, the same which they had given the year before. This the plaintiff refused to accept. Now if Mr. Wait was not authorized

to make any other contract with the plaintiff or to bind the town for any thing beyond that sum, it is difficult to see how he could lay them under an obligation to the plaintiff for an indefinite sum, and for an uncertain period of time, by his failure to contract.

It is contended however, that by Mr. Wait's saying he would come after Mrs. Jerald when the wheeling was good, it is to be considered that he employed the plaintiff to keep her until that time at the expense of the town, and that it was the duty of the overseers of the poor to take her away from the plaintiff's when his contract expired; and it is asked whether the plaintiff should have turned her out of doors.

It appears the plaintiff was not at liberty to infer that he was employed to keep this woman at the expense of the town, when he was informed of the extent of Mr. Ward's authority, and both he and Mr. Wait refused to make any contract.

When the year expired for which he contracted to keep her, he might refuse to make any further supplies for her support, might have turned her out of doors, if he chose, or taken any other course, which he thought proper, as, he would, if any other person was in his house for whom he did not feel under obligation to provide. If she was an entire stranger to his family and was in good health, (and it does not appear but that she was in her usual health, at this time) he would undoubtedly, have refused any longer to maintain her. But if she was connected with his family (and it is said that she was his mother in law,) he would probably keep her until she could be removed some where else, comfortably and without suffering any inconvenience arising from travelling at this season of the year. Any further support which he might have offered her would be upon the ground of charity or affection to her, but would not be on the ground of obligation, arising from any contract express or implied between him and the defendant.

There was nothing therefore in the testimony of Mr. Stoddard which would justify the inference that there was any request, contract or undertaking on the part of the defendant, which would authorize a recovery by the plaintiff in this case.

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The evidence offered as to the acknowledgements made by Mr. White, one of the overseers of the poor of the town of Londonderry was also properly rejected.

It is at least doubtful whether the evidence of the admissions of an overseer of the poor as to a transaction past, can in any case be received when such person is a competent witness. In England the admission of rated inhabitants are received as the admissions of a party to the suit, but it was strongly intimated in the case of *the King* vs. *the Inhabitants of Hardwick*, 11 East. 578; that as the interest of the inhabitants was very trifling the party who offers the declaration, should first call on the person who made the admission, and unless he refused to testify, evidence of his declarations would be entitled to very little weight. A statute has been passed, making all inhabitants witnesses in settlement cases, 54 Geo. III. c. 170. Since the passing of that statute it has been intimated that the admissions or declarations of an inhabitant would not, now, be received. The question however has not been directly decided to my knowledge. It is not necessary that we should now decide that question, as upon other grounds we think the testimony was inadmissible.

The acknowledgement of Mr. White was not the admission of any fact, or evidence of any fact, not a declaration of any thing done by him or either of the other overseers which would have the effect to make the town chargable. It was nothing more, than his opinion, that the physician's bill was due from the town to the plaintiff. From the view which has already been taken, this opinion could not have been correct unless the town employed the physician or requested the plaintiff so to do. Moreover, if the physician was employed, his claim was directly against the town; the plaintiff by paying him did not thereby make the town his debtor. The opinion of any individual belonging to a town, whose interest and feelings might be adverse to theirs, that a sum of money was due from such town ought not to be received in any case to charge them. So that if it should be considered (which is not decided in this case) that the declarations of the inhabitants of a town, can be received in evidence against them in a suit to which they are a party, and when the inhabit-

ant whose declaration is offered is an admissible witness; yet the acknowledgment which was offered in this case, was not the admission of any fact or contract or in relation to any act of the overseers which, if proved, would have fixed any liabilities on them.

The judgement of the County Court is therefore affirmed.

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LEWIS WHITING VS. HAZEN CORWIN.

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That a book account action is the proper remedy for articles delivered and not accounted for, or posted, when the plaintiff's book is balanced.

So it is for cash delivered to purchase articles for plaintiff, which were never purchased.

That a mistake by twice crediting the same articles may be rectified in this action, if they were proper articles to be charged on book, or there credited.

That it is not a matter of course, that the partie's oath is sufficient to support charges of mistakes, after the books are balanced. But his testimony to the delivery of the articles is good as in other cases.

This was an action of book account, commenced before a Justice, and appealed to the County Court; where judgement was rendered to account, and an auditor appointed to take the account; who made a special report, referring the case to the Court, in reference to all the items of the plaintiff's account.

The auditor attached a copy of the defendant's account to his report. A part of this he reported had been allowed to the defendant on a settlement, when the books were balanced, and the rest he reported to disallow, for the want of evidence to support it. The plaintiff's claim consisted of three items of charge, as follows. To 16 bushels of oats, delivered April 21st, 1831, at 2 shillings, $3,34.— To cash, deliver May 18th, 1831, $15,00. To error in crediting the same item twice in the account settled, $5,61.

The auditor, also, reported, that, after the date of the delivery of these articles, to wit, on the 14th day of June, A. D. 1831, the parties were together, settling their account; when the charges on the plaintiff's book amounted to $440; and the credits to the same sum. That un-

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der this, in the book, the plaintiff, in the presence of the defendant, and in pursuance of a settlement then made and concluded, wrote the following words and figures, to wit:

The above settled June 14th, 1831.

Afterwards, and under this were the charges made, for which this suit is brought.

Some other items were also charged, of a later date, but these were equalled by late credits.

The auditor also reported, that, when said book was balanced, the defendant gave the plaintiff his note for about thirty dollars for the balance then agreed upon.—That the defendant, thereupon, proposed to pass receipts. To this the plaintiff objected, saying there were other matters unsettled between them; and particularly mentioned the oats, and the said cash, which were not then charged on the book; and added, "we have settled so far, and, I will so enter on my book, to save looking that over again."

The auditor also reported, that it was proved by other testimony than that of the plaintiff, that the oats were sold and delivered to the defendant by the plaintiff's clerk, at their date; but were not charged till the 16th of July following. Also, that said fifteen dollars in cash were delivered to the defendant by the plaintiff on said 1st day of May 1831, not in payment, nor as a loan, but to be paid out by the defendant for certain factory cottons, which the plaintiff directed him to purchase for the plaintiff; and that the defendant did not so pay it out, but converted it to his own use. Also, that said error in crediting the same item twice did exist, and was not corrected in said settlement.

Each party claimed judgement on this Report. The County Court rendered judgement for the plaintiff, for the amount of the said three items, claimed by him. The defendant filed his exceptions to this decision; whereupon the cause comes up to this Court for revision.

Buck, for defendant.—I. The settlement made by the parties, as reported by the auditor, on the 14th June 1831, is final and conclusive between them, as to all matters, proper subjects of book account between them, prior to date, so far as relates to this action

The amount due was ascertained and agreed upon, and a note executed by the defendant for that balance. This was accord and satisfaction.

In this position we are not brought in conflict with the case of *Austin* vs. *Berry*, 3 Vt. Rep. 58. That case, in its material features, is not only not parallel, but is not even analogous to this. The difference is,

1st. The books, on which the settlement was made, in the case there decided, were kept by Berry; Austin trusting to him, and keeping no account.

2d. At the time of computation, it was stipulated, that, if any thing had been omitted, the claim therefor should not be prejudiced thereby.

3d. A mistake, or omission, was shown, and a refusal of Berry to rectify or allow it to Austin, as agreed.

No such circumstances attend this case. No intimation was given of matters, that had been, or might be, omitted, until after the computation, the balance struck, and note executed by Corwin, and delivered to Whitney.

II. If in this view, however, we are in error it follows, that all the accounts of the parties were open to adjudication. The previous proceedings were a mere *looking over*, and the note equivalent to so much money paid. Under this view, then, the auditor should have received, audited, and adjusted Corwins account. This he did not do, but rejected it, as the report shows, because all the items thereof had been allowed to the defendant on the settlement of June.

III. The two last items of the plaintiff's account are inadmissible under any circumstances.

1st. The charge of $15, when expressed according to the facts reported, is for so much money of the plaintiff's *embezzled* by the defendant. This surely cannot be, upon received principles, a subject of book account.

2d. The charge for a mistake in crediting one item twice, is totally inconsistent with the principles of book account. The plaintiff's remedy for this would have been to exhibit his whole account for adjustment, and to take a report for such sum as should appear, on examination by the auditor to be due.

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Hebard, for plaintiff.—The principal objection, on the part of the defendant, and the only one, that I know of, is, to the form of the action.

1st. There can be no despute about the indebtedness of the defendant to the plaintiff; for the report states, that the plaintiffs charges were all proved, and by other testimony than the plaintiff's own oath. Then there was no hardship imposed upon the defendant on account of the form of action; since the charges were supported by the same common law testimony, that would have been required, had the form of the action been different. On the contrary, the defendant had the benefit of his own oath to rebut the testimony of the plaintiff's witnesses, which he, otherwise, could not have had. The defendant, then, has nothing to complain of on the score of equity.

2d. In the next place, the form of the action is strictly, and technically, correct. I apprehend, that it is precisely adapted to transactions of this kind; it being that kind of business, that is ordinarily charged on book, without calling for any other evidence, by which to make the other party chargable. 1 Swift, 582.

The fact, that the parties had made a settlement, subsequent to the delivery of the money and the oats, and before they were charged, makes no difference, and no way alters the nature of the plaintiff's debt. Nor does it, necessarily, drive the plaintiff to a different mode of trial and proof. These articles were no way reckoned in the settlement, and formed no part of the account which the parties intended to settle. On the contrary, it was agreed at the time, that the articles should form the basis of a subsequent settlement: and they were accordingly charged upon the plaintiff's day book, and posted upon his ledger, in the same manner as his other accounts. *Austin* vs. *Berry et al.* 3 Vt. Rep. 58.

3d. The fact, that the money was delivered to the defendant for a special purpose makes no difference, provided the plaintiff does not call for it till such time as his right of action has become mature. *Fry* vs. *Slyfield*, 3 Vt. Rep. 246; *Newton* vs. *Higgings*, 2 Vt. Rep 366; 1 Swift, 582.

An article lent is a proper item of book charge, subject

to a special mode of payment, which is the returning the same article; and, if not returned, the value of the article may be recovered in this form of action. Money lent would be subject to the same rule. But this objection, if it were one in fact, could apply only to the charge for money.

4th. The doctrine has become well settled, that omitting to charge at the time of the delivery of the article, is not of itself, any valid objection to a book charge. And it has even been decided, that a plaintiff may recover in this form of action, when he has no book, excepting what he makes up in Court. *Bell* vs. *McLaran*, 3 Vt. Rep. 183.

5th. The charge for an error in crediting the same article twice is well sustained in the case of *Austin* vs. *Berry et al*, ut supra.

6th. The whole of the plaintiff's account, upon which he claims a right of recovery, is the same in principle, and the same in point of law, as though the articles there charged had been delivered at the time of charging, and had no connexion with that part of the plaintiff's account, which had been previously settled.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—The auditor's report of facts settled the point, that these items of the plaintiff's account, now in controversy, were not included in, or settled by, the settlement entered on the plaintiff's book, in June 1831.—That they were not then charged on the book; that the error of twice crediting the same item on said book was not then corrected; that the other two items of the plaintiff's account were then spoken of by him as unsettled matters; and that the plaintiff then refused to pass receipts, on account of these matters that remained unsettled.

From the facts, reported by the auditor, the plaintiff has a just claim, for which he ought to find some remedy. He finds that the oats were sold, by plaintiff's clerk to the defendant, in April, before the June settlement, but were not charged till the July following; that the $15 in money was delivered for the defendant to purchase articles for the plaintiff, which he never purchased, but converted the money to his own use; that the item was twice credited on book, as is now contended by the plaintiff, and

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this error not corrected on said settlement. And he finds all this from indifferent testimony, without the oath of the plaintiff. All this surely entitles him to redress, unless he has mistaken his remedy.

Upon this point, we will notice the items separately.—The charge for 16 bushels of oats is clearly a proper article of book charge, and there is no dispute but that the price is correctly allowed.

It is contended, that the charge of the money is in substance a charge of the defendant's embezzling so much money. We may do well to examine whether this be so.—For, surely, we ought to decide upon such items according to their reality, and not merely according to some shape, in which they may be presented. The actual circumstances of this money charge were, that the plaintiff delivered this sum of $15 to the defendant in trust for him to expend in a particular way, for the benefit of the plaintiff. The defendant accepted the money upon this trust. Had he expended the money according to this trust, showing that, even upon his own oath, would have been good accounting for the money; and all which the plaintiff had a right to claim of him. But he did not expend the money according to that trust; and he does not attempt to account for it in that way. But he must account for it in some way; and none is more proper than the one now pursued, where there is no difficulty about the proof, and none now exists. The plaintiff's claim for the money was complete, as soon as the defendant having received it, neglected or refused to use it for the benefit of the plaintiff, according to his trust. What afterwards became of it, whether the defendant used it for his own benefit, or destroyed it, cannot affect this action.

With regard to the charge to correct the error of crediting one article twice, all the difficulty is technical, arising from the shape in which the claim is presented. The article thus credited twice is not named. Suppose it in reality to be six bushels of grain. The book being balanced with this credit twice, would virtually make the defendant debtor for six bushels of grain. Let the charge, then be made thus, "To six bushels of grain, credit by mistake," and it would seem natural enough as a book

charge. It is most favorable to the defendant to have it allowed here rather than in a separate action.

Proper articles of book charge, can be recovered in this form of action, if in any form. If there is a settlement, which includes them, they ought not to be, and cannot be, recovered in any form of action. If they appear, prima facie, to be included in a settlement, when they were not, this embarrasses the plaintiff's proof, but does not change his remedy. We were governed by this doctrine in a case this winter in Franklin County; and we consider it a reasonable doctrine. Any other action may be of no use to the plaintiff, for want of proof to establish the delivery of the articles. If a question arises, how far the oath of the party may avail in such a case? The answer is at hand. He may swear to the delivery of the articles the same as in all other cases; and is as much entitled to credit, as he would be in any other case of his testifying to support his own account. If he is cross examined with regard to any settlement, which might include this account, he must answer truly; and exhibit what light he can from his books, and from any witness made at the time of the settlement spoken of. But it is not a matter of course, that the party is to gain full credit as an indifferent witness. His testimony must be weighed in connexion with whatever testimony is derived from the books, and from other witnesses, tending to oppose, or strengthen his testimony.— But the testimony of the party to his charges, delivered in the usual course of his deal, and charged at the time of delivery, in his usual way of charging on book, is generally considered sufficient proof of such charges, unless there is some evidence, tending to render his claim doubtful.— The case at bar is freed from all difficulty upon this head; for it does not appear, that the plaintiff offered himself as a witness, at all; and it does appear, that all the facts were proved by other testimony. The County Court, in deciding upon the special report of the auditor, allowed the plaintiff to recover for the three contested items; and that

Judgement is affirmed.

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TOWN OF ROYALTON VS. JACOB FOX & al.

It is discretionary with the Court whether they will issue a writ of *certiorari*.

Before issuing the writ they will examine the record, and if they discover that it would be an injury to the public to have the proceedings quashed they will refuse to issue the writ.

On an appeal from the decision of the Board of Road Commissioners, under the act of 1830, it was the duty of the committee, to affirm or reverse the order of the commissioners, and unless they were all agreed to reverse it was their duty to affirm. Therefore,

Where they only affirmed an order of the Commissioners, with respect to the erecting and building a bridge, but recommended to build it of a different plan or description than the one ordered by the Commisioners, their proceedings were irregular and were quashed on *certiorari*.

When by the repeal of a law, an inferior tribunal cannot carry their proceedings into full effect, and no mode is prescribed in the repealing statute for that purpose, the proceedings of the inferior tribunal if not completed, will be wholly set aside.

This was an application to this Court for a *certiorari* made by the town of Royalton, to be direeted to the Clerk of the late Board of Road Commissioners in the County, requiring him to certify the doings of said Board in the case therein stated. The whole proceeding, and the facts upon which the application is founded are fully set forth in the opinion of the Court.

Collamer, for Royalton, contended, I. The committee on the appeal were authorized only to affirm or reverse the order of the commissioners in whole as made. This they did not do, and therefore wrong.

1st. The commissioners were bound when they ordered a bridge, to prescribe its model, and as much bound to the last as first. This, if unreversed, became the measure of duty to the town; and if impracticable of execution, their only redress was appeal. This point should have been passed upon and been decisive before the committee, but in this case has been evaded.

2d. The town found the model impracticable; and if this were so shown, they had the right to have it reversed on appeal. Can this be evaded in this case, and the town left without any measure of duty, and subjected to additional cost in asserting their rights, and left liable to prosecution, whatever model of bridge they erect?

3d. Every order in judgement is vacated by appeal;

and therefore the said orders of the commissioners with all their incidents are vacated. Now the committee only affirm the first; and the order is imperfect and wrong.

II. The law creating the board of road commissioners was repealed before this business was perfected or could be; nor was the reservation of power therein sufficient to perfect it; therefore irregular.

Though the saving clause professed to reserve some power, it was inoperative, as the men went out of office the first day of December 1831, and the board ceased. No board existed to issue orders to perfect their doing, enforce their orders, issue process or receive and record the report of the committee on appeal. 3 Burr. 1456, 3 Cra. 281; 6 Pick. 501.

Marsh, contra.

The opinion of the Court was pronounced by

WILLIAMS, J.—This is an application by the town of Royalton, for a *certiorari* to be directed to the clerk of the late board of road commissioners in the County of Windsor to certify their doings in laying out a certain road and ordering the building of a bridge thereon, on the petition of Jacob Fox et al. Notice that such an application would be made has been given to Mr. Fox. As the Court always exercises a discretionary power in issuing this writ the party applying must set forth by affidavit such facts as shew that it is proper and expedient that the writ should issue. It is said in England, that the writ is issued as a matter of course on the application of the Crown, but otherwise on the application of the defendant. 2 Term Rep. 89.

In the case of *Lees* vs. *Childs*, 17 Mass. 351, the Court refused to grant the writ, because the applicants had failed to show that injustice had been done by the proceedings in the inferior tribunal; and in the case of *ex parte Weston & al.* 11 Mass. 417, it was remarked by the Court that before granting a *certiorari* they will always look into the record and even into the circumstances attending the process, because when the record is actually returned in obedience to the writ of *certiorari* they are bound to quash the whole proceeding if error should appear. When the error or ir-

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regularity complained of is merely in the forms of proceeding and no injustice has been done, or when from any other cause it would be a greater injury to quash the proceedings of the inferior tribunals than to have them remain, the Court in the exercise of their sound discretion will refuse the writ. *The King* vs. *Bass*, 5 Term 251; *Ex parte Jed. Miller*, 4 Mass. 565.

This application is founded on the affidavit of Mr. Collamer, who states, the proceedings both of the road commissioners and of the committee appointed by the County Court on appeal from the decision of the commissioners. By this affidavit it appears that the board of commissioners on the 18th day of Novembcr 1831, made an order on the town of Royalton, to build a bridge in a place directed in the order of a certain description and plan described the order, with a double trussell in the river. An appeal was taken from the decision of the road commissioners and a committee appointed, who on the 7th of August met to attend to the business of their appointment. The town of Royalton were heard before the committee, introduced evidence tending to shew the impracticability of sustaining a permanent bridge of the plan and description ordered, insisted that the committee must affirm or reverse the whole order, and requested that they would state their decision and the grounds of it, in writing. The committee made an order and adjudication in the following words. "That the said decision of the said road commissioners be affirmed with respect to the erecting and building a good and permanent bridge across said White River, in the place where the last bridge stood, near Jacob Fox's tavern house."— They then proceeded to recommend to the town to build the bridge of another form than the one ordered by the commissioners, and without any trussel, in the river. It will be noticed here that they neither affirm or reverse the decision of the commissioners. By the Statute in relation to roads and bridges passed in 1830 (sec. 30) it was made the duty of the road commissioners when they ordered a bridge to be built, to determine not only as to the time when the bridge was to be built, but also, the kind of bridge to be built, and it appears that this was done by the commissioners. On an appeal a committee were to

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be appointed by the County Court, who were to give notice to the parties to visit the petitioners and the town, make personal inspection of the premises, and reverse or affirm the order of the commissioners. This committee were not authorised to lay out a new road or direct the building of a bridge at a different place at a different time or of a different form or kind from the one laid out or ordered by the commissioners. Their power and their only power was to reverse or affirm the decision of the commissioners, and they could not reverse it unless all three of the committee were agreed therein. It was evidently therefore, the duty of the committee, if they were not agreed in reversing the order of the commissioners to affirm the same; and if they were unanimous in believing that the order of the commissioners was erroneous, and that it was impracticable or inexpedient for the town to build or maintain a bridge of the form or kind ordered by the commissioners, to reverse their decision, leaving the petitioners to take such further steps as should be thought best. The position that was taken by the town of Royalton in the hearing before the committee, was undoubtedly correct, to wit, that it was the duty of the committee to affirm or reverse the whole order of the commissioners, and that if the committee were convinced of the impracticability of sustaining there a bridge of the description ordered they should reverse the said order. If the committee had affirmed the order of the commissioners, and then added the recommendation to build the bridge of another form and without trussels, there might have been some foundation for the argument which has been urged, that this recommendation should be treated as mere surplusage. Though it would have appeared somewhat singular if the committee had affirmed an order, a compliance with which if it could have heen enforced at all by the provisions of any existing law, must have been by indictment against the town for not performing the order, and yet recommend to the town not to perform the order, or in other words not to build the bridge of the kind ordered, but of a different kind. In this case the committee have not affirmed the decision of the commissioners. They coincide with the commissioners in opinion that it was proper and necessa-

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ry to erect a permanent bridge at the place described, but disagree with them as to the kind of bridge to be built, and neither affirm or reverse the decision of the commissioners. For the reason above, the whole proceedings should be set aside. It is not necessary for us to say what would have been the situation of the proceedings of the commissioners after an appeal, if the committee had not been called out, whether the proceedings of the commissioners would not be considered as established unless the party appealing call out the committee, inasmuch as we are of opinion that when the committee are called out and do make inspection, they must make a decision in the premises or the whole proceedings should be set aside.— A town appealing is entitled to a decision from the committee affirming the order of the commissioners before they are subject to any expense about making a road or building a bridge.

There is also another ground on which the Court would have granted this *certiorari*. The law under which these proceedings were had was repealed at the session of the Legislature in 1831, and the board of commissioners as such ceased to exist. I can see no way in which the order of the board of commissioners for building or erecting a bridge, where there was none before could be enforced, except by the commissioners themselves issuing an extent against the town to collect such sum as they order for that purpose, and by expending the same in making a bridge under the superintendance of a committee appointed for that purpose.

At the time the committee were called out there was no board of commissioners in existence to issue such extent, and of course they could not complete their proceedings. The Statute of 1806, which was the only statute in existence relating to building bridges, authorises the County Court on petition to appoint a committee and on their report to make order for the building a bridge if they think proper. This statute gives to such committee the power of determining on the expediency of erecting such bridge, and is wholly an original proceeding. Such a committee may still be asked for, and appointed, and the establishment of this bridge by the road commissioners

would have no effect upon their proceedings and would be wholly inoperative, as the road commissioners could not complete their proceedings and no tribunal has been erected to carry them into effect.

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This would of itself be a sufficient reason for issuing a *certiorari* and quashing proceedings which cannot be completed. The Court think this a proper case for them in the exercise of their discretionary power to award that a writ of *certiorari* issue, and it is accordingly ordered that such writ issue. The writ was issued, the parties consented to a return instanter, and thereupon the proceedings of the road commissioners and the committee were set aside.

[The Legislature have since, by an act passed November 8th, 1832, made provision that the clerks of the County Court may issue extents and grant executions in the same manner that the clerk of the commissioners could have done if they had been continued in office.]

ENOCH BURNHAM, JR. VS. GEORGE BASS.

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That, to a *scire facias* upon a recognizance, entered into for the prosecution of an appeal, it is no defence that the original plaintiff, who appealed, being a feme sole administratrix, married, before the sitting of the Appellate Court.

That the appeal might have been entered and prosecuted by an administrator *de bonis non*.

This was a *scire facias* upon a recognizance of seventy-five dollars, entered into before a justice of the peace, and conditioned for the prosecution of an appeal from the judgement of said justice to the County Court. The original suit was in favor of Talitha Burnham, administratrix of one Rufus Burnham, deceased, against one Enoch Burnham, jr. The said Enoch recovered judgement for his cost, being about ten dollars; and the said Talitha appealed to the County Court, and neglected to enter her appeal. The said Enoch filed his complaint, and procured the affirmance of said judgement in the County Court, with additional costs; amounting in the whole to about twenty dollars.—To recover this cost, the present *scire facias* was brought to the County Court; where the defendant interposed a

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plea in bar, that the said Talitha, after the said appeal, and before the time of entering the same in the County Court, intermarried with one Fox, by which her administration ceased, and she could no further prosecute said suit; and that the cost recovered before the said justice, had already been paid and satisfied. To this plea, the plaintiff demurred.

The County Court adjudged this plea in bar insufficient. And the defendant filed exceptions to this decision; and also entered an appeal to this Court.

When the action was called in this Court, a query was suggested by counsel, whose duty it was to furnish the Court with copies. Because, if it should be argued as coming up by appeal, the party demurring would have the opening and closing argument, as he had in the County Court; and it would be his duty to furnish the Court with copies. But, if it should be argued as coming up on exceptions, the party excepting would be as a plaintiff in a writ of error; and he would open and close the arguments; and it would be his duty to furnish the Court with copies. The Court considered, that, as the ancient rule, requiring the demurrant, and the plaintiff in error, to furnish the copies, was predicated upon a supposed privilege of opening and closing the argument, where there is no other ground of distinction, and the claims seem equal, the privilege is acceded to the plaintiff. So the plaintiff's counsel went forward in argument—having first furnished copies required by the rules of this Court.

Argument for the plaintiff.—The main question in this case is, did the marriage of Mrs. Burnham, for whose acts the defendant covenanted, discharge the recognizance?

If a person undertakes by bond to do an act, or that an act shall be done, it is not sufficient for him to show, that he has done all in his power.—Bull. N. P. 164–5.

Thus, if a party undertakes, that a condition shall be performed by a stranger, and the latter refuses, this is no excuse, unless such refusal be procured by the other party.—5 Vin. Abr. 239.—6 Ter. Rep. 210, 710. Case cited 1 T. R. 642.—*Doughty* vs. *Neal*, 1 Sand. 216; Shep. Touch. 387.

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So, where the obligor prevents the performance of a condition precedent, by his neglect or default, it is equal to performance by the plaintiff.—1 Term Rep. 638.

The converse of this principle must also hold; that is, if the obligor places it out of his power to perform the condition, it is equal to non-performance on his part; and so are the authorities.—12 East. 436. —3 Com. Dig. 123, M. 2. —Litt. Sec. 356–6–7.—Co. Lit. 221, b.—3 Com. Dig. M. 3 Pl. 1, 2, 5, 6.—5 Vin. Abr. 223, Pl. 11.

Again, if a recognizance be conditioned for the appearance of B. at the next assizes holden for the County of S., and, before the next assizes, B. sues a *certiorari* out of the K. B. to remove the recognizor, and, at the next assizes, delivers the *certiorari* to the Judge, yet this does not excuse his appearance; for though the *certiorari* was the command of the King's, yet the purchase thereof was the act of B.; and he could, by no such plight, save his recognizance.—6 Peters. Abr. 53.—3 Yelv. 207.—2 Sec. 26.—Vint. 275.—2 Kib. 831.—Vide also Shep. Touch. 391.

This case is not to be distinguished from the one at bar. So, it is a breach of a condition, if the obligor is disabled to perform in the same plight and condition, that he was, when the condition was created.—Co. Lit. 221, *a*.

In Viner, this case is put: If a widow gives a bond, conditioned to make further assurance, &c. at the expense of the obligee, and she afterwards *marries*, this is a breach of the bond; as the condition could not be performed in the same plight and without more expense to the obligee.—5 Vin. Abr. 223, Pl. 11.—Vide also Shep. Touch. 383.

So, if I am bound to present J. S. to the church of B., and J. S. in the mean time *marries*, yet the condition is not discharged.—5 Vin. Abr. 230, Pl. 17.

The case at bar falls directly within the principle of these cases. The defendant undertook that Mrs. B. as administratrix, should prosecute the appeal to effect, &c., not that any one else should prosecute, but that *she* should do it.—Now, nothing will excuse a non-performance of this condition, but *the act of God, the act of the law*, or *that of the plaintiff himself*.—Bull. N. P. 164–5.

But the matter, set up in bar of the action, is the *marriage*—the act of Mrs. B. the principal. This, in reality,

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is the only excuse assigned. It is true, that the statute says, that on the *marriage* of any administratrix, her powers, as such, shall cease; but it is, after all, the act of the party, that produces this effect. This constitutes no defence, according to all the authorities; for, to allow it, would be to allow the defendant to take advantage of his own wrong; or, what is the same thing, that of his principal. It does not lie in the defendant's mouth to say, that he is discharged from his liability on the bond, because his principal, by her own voluntary act, deprived herself of the power to prosecute the appeal. The very want of power, occasioned by her act, is a breach of the recognizance.

But, it is said that the judgement of affirmance was improperly rendered, Mrs. B. having married. Was this correct, it would be no defence. It is a sufficient answer, however, to say, the judgement having been affirmed by a Court of general jurisdiction, it is good until reversed, and cannot be overhauled in this collateral manner.—3 Cranch, 309.—Cro. Eliz. 278.—Cro. Jac. 246.—1 Wils. 302.—8 Rep. 96.—4 Mass. Rep. 303-4.

Judgements of a Court of general jurisdiction, are void only in cases where *from the judgement itself*, it is apparent, that the Court have not any jurisdiction.—2 Aik. Rep. 249.—2 Salk. 674.—Per. Sedgwick, J.—4 Mass. Rep. 303.

We take it as perfectly clear, that, if Mrs. B. had entered her appeal, and nothing had been said about her marriage, and final judgement had been given for the defendant, the defendant, in his suit, could not have taken advantage of the determination of her power. And, can her suffering the affirmance of the judgement, place this defendant in any better situation? He is as much bound by the judgement, and by the acts of his principal, as the principal herself.—1 Aik. Rep. 339.—16 John. Rep. 117.—2 Burr. 1187.

It was further said, that, no costs having accrued between the appeal and the marriage, it was wholly unnecessary to procure the affirmance of the judgement; and that the plaintiff did it in his own wrong. This is no answer to the action, if it was true; and in the second place, the position is not correct. By the appeal, the judgement of the justice was vacated and no action of debt could have been

founded upon it.—5 Mass. R. 376. And it would seem to follow, as a necessary consequence, that no suit could be sustained on any recognizance, taken to prosecute the suit: at most, for any thing more than nominal damages. In order to sustain on action on such a recognizance, there must be an existing and operative judgement for costs.

Upham, for defendant.—This case comes before the Court on general demurrer to defendant's plea in bar.

The principal question, presented by the pleadings, is the following, viz: Did the marriage of the appellant, pending the appeal, extinguish her right as administratrix, abate the suit, and discharge the said George Bass from his recognizance?

We maintain that it did.

By the 38th section of the probate act, it is declared, "that, when a feme-sole, appointed alone, or with one, or more persons, executrix, administratrix or guardian, shall marry, such marriage shall extinguish her right, under such appointment."—Statute, 340.

The right, then, of the appellant, further to prosecute her said appeal, was, on the 8th of November, A. D. 1830, extinguished by operation of law; and it became impossible for her further to proceed with her action. The question now arises, what effect did this marriage have upon the suit? We insist, that it abated the suit, and discharged this defendant from his recognizance.

It is a general principle, that, where a bond, or recognizance is a thing in action, and executory, and no advantage can be taken, until there be a default in the obligor, if the condition is possible at the time of making, and, before the same can be performed, it becomes impossible, or is prevented by the death of the party, or by the act of the law, the obligation is saved.—Co.-Lit. 206, *a*.—Bull. N. P. 164.—1 Shep. Touch. 381-2.—1 Sand. Rep. 216 *n*. 2.—1 Pick. Rep. 284.

It has frequently been determined, in England, in an action on a replevin bond with a condition *to prosecute with effect*, according to the form there, that a prosecution of the suit until it is abated by the death of one of the parties, is a prosecution with effect, and a good performance of the

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condition.—*Ormond* vs. *Bierly*, Carth. 519.—12 Mod. 381. —1 Pick. Rep. 284.

If the plaintiff prosecute to the end of the cause, or as far as the law will allow, he most certainly fulfils the condition of his bond.

In *Peake* vs. *Keyes*, 3 Vt. Rep. 517, the Court ruled, that a recognizance, taken for the appeal of an action, was discharged by the death of the appellant, pending the appeal.

The appellant, in the case at bar, it is true, did not die a natural death; but she died as administratrix. Her power, further to administer upon her deceased husband's estate, ceased; and she could no more proceed with her action, than though she slumbered in her grave.

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage; or, at least, is incorporated and consolidated into that of the husband; so that, independently of her husband, she has no legal existence.—1 Black. Com. 442.—8 Ter. Rep. 545.

But, it is said, this act of the appellant, which extinguished her right as administratrix, and merged her legal existence, was voluntary; and, therefore, the defendant was not discharged from his recognizance. The marriage of the appellant was a voluntary act, we admit; but the conclusion, drawn by the gentleman, we deny. This defendant had no control over the appellant, and could not prevent her marriage. Again, the appeal was taken on the 30th day of June, A. D. 1830, to the the then next Dec. Term of the Court; and the appellant's right, further to prosecute her said appeal, became extinguished by her marriage, on the 8th day of November, A. D. 1830; more than 30 days before the term of the Court, to which the appeal was taken, commenced. At the time of the appellant's marriage, the appellee was entitled to no cost, save what had accrued before the justice; and for that he had no claim against the defendant. But it appears from the pleadings, that the appellees, after the appellant's right further to prosecute said appeal had ceased, took out copies from the justice, and procured his judgement affirmed in the County Court. All the appellee's proceedings in the County Court, we insist, are void.

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The opinion of the Court was pronounced by HUTCHINSON, C. J.—The only questions to be decided are, whether the suit of Talitha Burnham, administratrix, became discontinued, by her marriage after the appeal, in as full a sense as would be effected by the natural death of a plaintiff, and a representation of his estate to be insolvent; and whether, even in that case, as the marriage was her voluntary act, it would relieve the bondsman.

The Court consider, that her marriage was not a discontinuance of the action. It effected a total destruction of her right to prosecute the suit. But an administrator *de bonis non* might have been appointed, and could prosecute the suit as fully as she might have done, had there been no marriage. If sufficient time had not elapsed for such appointment, after her marriage, she might have entered her appeal, and the Court would, probably, have granted a continuance, to await such appointment. This case does not compare, at all, with that class of cases, of which *Peake* vs. *Keyes* was one. In those cases, the statute is imperative, that the action shall be discontinued; not upon the decease of the plaintiff, merely, but upon his decease, and representation that his estate is insolvent. If there is no such representation of insolvency, and the action be of a nature which survives, it may be prosecuted by his executor or administrator, the same as though that special provision had been omitted in the statute. That is a convenient provision; because it carries both debt and cost before the Commissioners for their adjustment, like claims that have never been sued. There is no such provision in case of the marriage of a feme sole administratrix: there is no necessity for it: for, as soon as one administration ceases, another may be created, and save the rights of both parties to the action.

With regard to the second question, we entertain no doubts but that the marriage being voluntary on the part of Talitha, the administratrix, and not the act of God, or of the opposite party. The recognizor to prosecute the appeal was holden as firmly as security for costs in such an event, as in any other.

Enoch Burnham, the appellee, might not know of the marriage, and nothing appears that he did know of it,

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when he procured the affirmance of the judgement. He cannot, therefore, be accused of making unnecessary cost, by filing his complaint for affirmance. It was his regular course, as a matter of right. It must be the regular course in all cases, where the action survives, and where there is not both the decease of the plaintiff and a representation that his estate is insolvent. That the cost, recovered before the justice, has been since paid, can have no other effect in this suit, than to diminish the sum now to be recovered.

The judgement of the County Court was that the plea in bar was insufficient; and that judgement is now affirmed.

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MORRIS KINGSBURY vs. BENJAMIN WHITNEY and others.

That, when a Captain forfeits a penalty by neglecting to make the returns, required by law, in the month of June, and the Commandant demands the fine or penalty within sixty days, he may afterwards issue his execution, although he may have made no record of his having assessed the fine.

That the statute does not require such officer to make a record of his proceedings, nor attach any validity to such record, if made.

That a recital in the execution, dated September 22d, that defendant was amerced September 20th, in the same year, is well enough, if it appear in evidence, that the fine had become payable before that time, by neglect of duty, and the making of a regular demand.

That, if a Captain be committed on execution for a fine, and give a note payable to the adjutant for the amount of the fine and cost, and a discharge is written upon the copy left with the keeper of the jail, signed by such keeper, and two years have elapsed without any objection to this proceeding, or any further pursuit of the execution, the jury may presume the assent of all concerned to the authority in the adjutant and jailer, to take such note.

A new trial was granted in this action a year ago.

On a trial at the December Term of the County Court, in 1832, some of the questions, before decided, were urged anew, and some were varied by additional testimony.———On this trial, there was testimony, which showed, that Major Morrill, on the third day of July, 1830, demanded of each of said two Captains, their respective fines for neglecting to make their returns during the preceding June, adding, that he would still receive their returns, if they would make them then; and that there was no compliance with either part of said proposition. The

plaintiff offered to prove the knowledge and consent of Morrill, that the plaintiff should take this note in discharge of said executions. This was objected to by the defendants, but was admitted by the Court. The witness, however, who was called for this purpose, recollected nothing about it.

There was no evidence, that the commanding officer of the regiment, or the Quarter-Master, ever disapproved of the taking of this note instead of money, on said executions.

The defendants requested the Court to charge the jury, that, if they found said note was taken in consideration of the imprisonment of the defendants by the plaintiff on said executions, said note was void, and they should return a verdict for the defendants.

The defendants also requested the Court to charge the jury, that a demand of the fines of the said Whitney and Kemp was not a sufficient evidence of the imposition of the same; that some act of the commanding officer was necessary, to render the defendants liable to execution for said fines, other than a mere demand and neglect. The defendants also requested the Court to charge the jury, that, if the demand for the fines was in the alternative, or coupled with a demand of the returns to be made by the said Captains, such demand was not sufficient to justify the issue of said executions. The defendants further requested the Court to charge the jury, that, if these fines were imposed on the 20th of September, they were improperly imposed, and the imprisonment of the defendants unlawful.

But the Court refused so to charge the jury; and did charge them, that, if they found the said Morrill was a Major, and commanding officer of said regiment, in which the said Whitney and Kemp were Captains, and that they had neglected to make the returns of the state of their companies in the month of June, 1831, and that said Morrill, on the third day of July, 1831, had demanded of them respectively their fines, whether he did or did not express a willingness to receive the returns, if all was demanded, to be done forthwith; and further found, that said fines had not been paid within fifteen days after such demand, the commanding officer was authorized to issue his executions for the collection of said fines, in manner and form, and at

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the time, in these executions set forth; and, that the plaintiff, on receiving said executions, was authorized as adjutant (his being such being conceded on trial) to commit the said Whitney and Kemp, as in his returns on said executions is set forth: That the fines were due by operation of law, on the neglect to make returns according to law; and nothing more was necessary, but a demand of the same by the commanding officer; and, on a neglect for more than fifteen days on the part of the Captains to pay the same, executions might issue therefor.—That the jury might treat what was said in the executions about the amercement being on the 20th day of September as surplusage, and mistake in form. The Court did further instruct the jury, that, if they found the said Whitney and Kemp were lawfully imprisoned as above charged, and that the note in question was by the defendants voluntarily executed, and that the same was received by the jailer as money, and the defendants discharged in consideration thereof, and that neither the commanding officer, nor the Quarter-Master of the regiment had ever disapproved of this note's being taken instead of money in satisfaction of said executions, they might well presume the consent of all concerned, that the business should be done as it was done; and this note, which thus far answered the defendants the same purpose as the payment of so much money, was good and binding upon them. In which case they would find a verdict for the plaintiff.

To which decisions and instructions of the Court the defendants excepted, and the cause passed to this Court for revision.

Argument for the defendants.—I. The executions, offered by the plaintiff, and admitted by the Court as evidence, were improperly admitted. These executions, if to have any effect as evidence, are to justify the imprisonment alleged as having been made.

1st, For a fine imposed for neglect in making returns of the state of the companies, commanded by two of the defendants, in June, 1830.

2d, For a fine imposed on the third day of July, 1830.

3d, For a fine imposed by the commanding officer of the regiment.

Now, they tend to prove neither of these facts. On the contrary, they expressly set forth a fine imposed on the 20*th September*, 1830, for a *delinquency of returns*, without specifying what returns; and are subscribed by the Major without any addition.

II. The testimony, admitted to show the consent of the Major to the taking the note, was inadmissible.

1st, Because the Major is a competent witness himself, and should have been called on.

2d, Because, if he did consent, it was wholly without any legal authority so to do, and such consent was nothing more than that of any stranger.

III. The Court misdirected the jury in this, that the fines were imposed *necessarily* by operation of law, and that the only act of the commanding officer, to be performed, is a demand of the fines. The officer has a discretion in imposing the fines; and may omit so to do, upon good cause. A contrary construction is inconsistent with the rules of construing penal statutes. The returns may be omitted because of sickness, loss of rolls, or other good cause; or may be made on the first day of July. Yet the fine, according to the construction, is imposed, and the commanding officer is imperatively required to collect them.—Revised Stat. 635, § 34.

IV. If, however, the imprisonment is justified by legal proof, and it is made judicially to appear, that two of the defendants were lawfully imprisoned for the causes alleged by the plaintiff, yet such imprisonment constitutes no consideration for this note, which is a promise to pay money to the plaintiff, Morris Kingsbury. The plaintiff had no interest in, or concern with, this business. All his power over it, or connexion with it, ceased, on his commitment of the defendants to prison. These fines were payable to the Quarter-Master, and any contract or promise, to be of any validity, if good at all, must be to him.—Rev. Stat. 438, § 40.—6 Mass. Rep. 253, *Bainbridge* vs. *Downie*.

V. The charge of the Court, that the jury might presume the consent of all concerned, was erroneous.

1st, Because it does not appear, that any notice of the transaction of the business was ever given to any one concerned, either the Major or Quarter-Master.

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2d, Because they were not concerned: they had no power to consent that this note should be executed and received. The presumption of consent is predicated upon the supposition that the officers mentioned are *principals*; when in fact they are *agents*, with specific and limited powers. The State is the principal; and the fines are for the benefit of the State, to be applied to the improvement of the militia.

VI. The charge was erroneous in this, that the jury were put upon finding a fact no way in issue, and which the defendants could not raise, viz: that the Captains did neglect to make returns in June, 1830.

VII. The Court ought to have instructed the Jury, that if any condition was annexed to the demand of the fines, or if it was in the alternative, e. g. to pay the fines or make the returns, such demand did not authorize the issue of execution.

VIII. The Court misdirected the jury in this, that so much of the executions as relates to the amercement and date thereof, might be treated as surplusage and mistake. We object

1st, Strike out this part, and the precepts become a nullity, partaking in no respect of the nature of an execution; and are no more than mere orders of a military officer to imprison two of the defendants.

2d, The Statute provides, (Rev. Stat. 632, § 12) any officer, neglecting to make returns, &c. "shall be fined "by the officer, to whom the returns should have been "made, a fine of twenty dollars," &c. The officer is made an agent in imposing the fine, and is to act therein.

Now, these executions are important in the point in question, as showing when the officer did so act, and when he did fine the delinquent; and as showing, that no fines were imposed previous to 20th September, 1830; and that the demand was not considered as an imposition of the fines, and as such was proper for the jury to weigh. The executions are the only record in existence, affording any evidence of all these matters; and that is destroyed by the striking out.

Argument for the plaintiff.—I. The first question arising

in the case is, Was the note void for duress of imprisonment? In order to be so, the imprisonment must have been unlawful; such as would be relieved by *habeas corpus*, or sustain an action for false imprisonment. The plaintiff insists, that the imprisonment was lawful. The defendants are understood to contend, that the imprisonment was unlawful, for these reasons:

1st, That something more than demand for fine was necessary to be done by the commanding officer, before issuing execution.

2d, That the execution was merely signed "Major."

3d, That the executions do not state the kind of delinquency, nor the previous proceedings.

In answer to these objections, the plaintiff insists,

1st, That, by the Militia Law, Art. 12, Sec. 33, the forfeiture of the Captain for not making return, occurs on the 1st of July. By the same Statute, No. 3, Sec. 7, this fine is directed to be collected as that in Art. 13. The course is pointed out in Sec. 34. The forfeiture takes place by operation of law, on the 1st of July. The commanding officer is to demand in 60 days after; and, if the payment is then neglected for 15 days, execution may, at any after time, issue. Now, the statute most clearly requires nothing to be done by the commanding officer, but to make demand. And, for more to be required by the Court, must operate ruin to the officers, who are not presumed versed in the law; and, at the same time, are bound to do their duty or be prosecuted.—Stat. 632, 641, 635.

2d, The commanding officer signed "Major," and, as he as Major could issue execution only when the place of Colonel was vacant, it is to be presumed, in this case, that the contingency existed.—2 Aikens' Rep. 30, *Hatch, ex parte.*

3d, The execution need not state the previous proceedings. No execution does, either civil or military. The execution does state the delinquency to be not making returns; and this is more than is necessary.

4th, The plaintiff considers, that all these questions were decided, at the last term, for the plaintiff; and the only difficulty then found was, that the execution stated the amercement to be in September; and there was no

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proof in the case of any previous demand, to show a case justifying the issue of an execution in any form. Now demand is found. It is perfectly obvious now, how this took place; that is, by following the form of Captain's execution, the only one given in the military law; and it is much to be hoped, the Major may find protection in the honest discharge of duty, and no sacrifice of right be permitted in an improper carping at forms.

II. If this note be not void on account of duress of imprisonment, is it void as unlawfully taken for the release of the Captains from a lawful imprisonment and received by the jailer unlawfully, *colore officii*, without consideration?

1st, A note given voluntarily, with a full knowledge of all facts, cannot be avoided for want of consideration, unless on some imperious rule, derived from the *policy* of the law, which forbids its recovery. Now, most obviously, the defendants were in no way defrauded. The note was executed for a purpose which it answered, and which there is no rule of law to forbid.—5 Pick. Rep. 380, *Train* vs. *Gold*. As to Prison Bonds, see 7 Mass. Rep. 98.—8 do. 373.—do. do. 423. Replevin Bonds, see 5 Mass. Rep. 314.—8 do. 147.—do. do. 153.

2d, Any advantage to the party promising, or any disadvantage or liability, incurred by another at his request, either a promisor or third person, is a sufficient consideration for an express promise. Here, at the request of the defendants, the jailer gave them their liberty and incurred the liability of being answerable for the amount of the executions; and this constituted sufficient consideration for the note.—3 Pick. Rep. 92, *Cabot & al.* vs. *Haskins & al.*—Phillips' Digest, 89, 90.

3d, This note was taken as pay for the executions. And, to whomsoever taken, it was in trust for him, to whom the money ultimately belongs. A part of that, the fees, belongs to plaintiff; so it was as well taken to him as any one.—And, in such case, the assent of the *cestui que trust* is to be presumed. Nor have the defendants offered to show any dissent; or, that the consideration, either in part or in whole, has in any way failed. To make defence in full, they must show, that the consideration *wholly* failed. Then, most obviously, the fees are paid.

4th, Any promise deliberately made, even without consideration, which induces third persons to part with property or rights, is good. This promise did induce the jailer to let the defendants depart, and to incur liability, and should therefore be enforced.—3 Mass. Rep. 1, *Willson* vs. *Clements*.

III. The defendants may insist that the Court erred in admitting testimony tending to show the previous consent of the commanding officer. But,

1st, Such testimony was not improper.

2d, The case expressly finds, and such was the fact, that no such testimony was put into the case, or urged to the jury.

HUTCHINSON, C. J., after alluding to the facts as they appeared in the case as it has now come up from the County Court, and as it came up a year ago, pronounced the opinion of the Court.

That the signing of these executions by Morrill, as Major, accompanied with proof, that the office of Colonel was vacant, was decided a year ago, to be well enough. The mast correct mode of signing, is that which best describes the official character in which the person acts. For instance, when a Justice of the Supreme Court acts as a Justice of the Peace, merely, he should sign as a Justice of the Peace throughout the State. Yet his signing as Judge of the Supreme Court is well enough; because that carries with it the office of Justice of the Peace throughout the State. So a Councillor may, in a like case, sign as Councillor: because that carries with it the office of Justice of the Peace for the whole State.

Again, it is urged by defendants' counsel, that the demand, now shown, is conditional and void. It is not so viewed by this Court. The testimony, if it shows any thing, shows a direct demand of the fines. And, the commandant's being, and expressing himself willing still to receive the returns, ought to have no effect upon this case, unless the returns were then delivered, according to the proposition, so that the commandant of the regiment might make his returns to the General. This shows a spirit of accommodation in Major Morrill, but it furnishes no alleviation

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to the defendants, as they declined meeting it in any way to answer the demands of the law, or enable the Major to perform his duty.

Again, the executions were objected to, as being defective upon the face of them. They mention delinquency of making their returns, without stating what returns. Nothing has been exhibited in the case to show any uncertainty in this respect. There is full proof of a neglect to make the June returns; and the demand, which must have been made in sixty days, was made July 3d, for not making returns the preceding June; and no others are spoken of. The statute has furnished no form, nor special direction, to guide in this particular. And what is averred in these cases, is as much as is required by the statute, in the form given for Captains, when they issue executions.

Another defect pointed out, is, that each fine is stated to be assessed on the 20th of September; and it is urged that the time was then passed, in which the defendants could be amerced; it being more than sixty days from the forfeiture. This would be a fatal objection if the statute required a record of the amercement, and required that record to be made within sixty days. But the only duty required to be performed in sixty days is, the making the demand of the fine.—That must be done within sixty days, or the fine can never be collected. The statute requires no record to be made of this; nor does it attach any validity to one, if made. Parol proof would still be required of the demand. Men are not appointed to military offices because of any supposed acquaintance with legal proceedings: and more must not be required of them, than is either directed by statute, or clearly implied as a matter of duty. Where the recital in the execution is, that the amercement was on the 20th of September, and nothing else is brought into the case to show when, how, or whether, the forfeiture had become absolute upon the defendants in the execution, it must be a fatal defect. Such was this case a year ago. But when, as in the present case, the fact is established by other proof, that there was a neglect, by which a forfeiture was incurred, and that a demand was seasonably made of this forfeiture, and that fifteen days had elapsed after the demand, and yet the defendant had not

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paid this forfeiture or fine, the liability of the Captain to pay this fine had become complete and absolute, whether any record or memorandum in writing had been made of it or not. It was, therefore, unnecessary for the Commandant to state in his execution when, or by whom, the defendants were amerced. It would have been sufficient for him to have recited, that the defendants had forfeited the penalty of twenty dollars for delinquency in making returns. As his statement of the 20th of September was no description of any record, and as the day was immaterial with regard to that fact, which was true, in a legal sense, any day, and each day, after the demand made and fifteen days had elapsed from the time of such demand, the same may be treated as surplusage, and not at war with the facts otherwise shown, and which fully show the matter matured for execution. The objections to the execution are overruled; and, the facts being as the jury must have found them, the imprisonment was legal.

Another question is urged, whether this note is not void for want of consideration. This objection is predicated upon the want of power in the plaintiff, after he had committed the defendants on the two executions, to receive this note and discharge the executions. It appears, that this note was received instead of money; and was, probably, considered as good as money; and the jailer, by direction of the plaintiff, discharged the executions upon receiving this note, with no other payment. As the cause went to the jury, and as they have found the facts to be, we are under no necessity of deciding upon the strict power of the plaintiff to direct the executions discharged, upon receiving this note, payable to himself. Neither he nor the keeper of the jail, can compel those, who were entitled to the money, to wait for the collection of this note. So far as the plaintiff was liable, if at all, he might be treated as having received the money. The Sheriff, also, might have been sued for the escape; and the taking of this note would have been no defence. But, that any legal process could afterwards have issued against Whitney and Kemp, is by no means certain. Before the commitment, the plaintiff, the Adjutant, had an undoubted right to receive the money, and discharge the executions.—After the commit-

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ment, the keeper of the jail had as good a right thus to receive the money and execute discharges. Whitney and Kemp, as if unable then to pay the money, gave this note of themselves and sureties, on seeing the executions discharged. They may have given pledges to their sureties, which would add to the difficulty of pursuing the claims, otherwise than upon this note. It was clearly received as payment; and answered the same purpose as money to procure the discharge of Whitney and Kemp from their imprisonment; and they, surely, have no right to object to a recovery on the note, unless they are in danger of being again pursued with new executions. So long a time had elapsed with no wish or pretence of the plaintiff or the commandant, or the Quarter-Master, or any one else, to pursue them in any other way, than by collecting this note, it was correctly submitted to the jury to presume the consent and acquiescence of all concerned, that this note should stand as security for the amount of the executions; and that the plaintiff, the payee of the note, should be their trustee to collect the note, and disburse the money; retaining his own fees, which were included in the note.

The objection to the Court's admitting direct testimony of Major Morrill's consent to take this note in payment of the executions, is answered by the result, that no such testimony was given; and, therefore, the defendants could not be injured by it.

The Court discover no error in the proceedings of the County Court at the last trial; and their judgement is affirmed.

Daniel Azro A. Buck, for the defendants.

Jacob Collamer, for the plaintiff.

The Overseers of the Poor of Bradford vs. the Overseers of the Poor of Lunenburgh.

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A child, who has not been *emancipated*, will derive a settlement from the settlement of his father; and if his father dies, and his mother subsequently acquires a new settlement, by one year's residence in town, without being warned out, the child then derives a settlement from that of his mother.

But if before the mother acquires her new settlement, the child is of age; or has married; or has gained a settlement for himself; or has contracted any relation inconsistent with the relation of parent and child, and by which the mother loses her government over him; then he is *emancipated*, and cannot derive a settlement from that of his mother subsequently acquired.

This was an appeal by the Overseers of Lunenburgh from the order of removal made on the complaint of the Overseers of Bradford, against *Harvey Webb*, and others. The appellants plead, that said Harvey was unduly removed, because his last place of legal settlement was not in Lunenburgh. Issue joined to the Court.

The parties submitted the cause to the Court for consideration and decision upon the following facts, viz: That the said Harvey Webb was born in Lancaster, in the State of New-Hampshire, on the 24th day of July, 1798—That the said Harvey moved with his parents, Ashbel O. Webb and Sally Webb, into the town of Lunenburgh, in December, 1798, and resided there with his parents until the 27th day of March, 1813, when his father died.—That after the death of his father, the said Harvey resided with his mother at said Lunenburgh, until August or September, 1814, when his mother, being very poor, went to live at Newbury, in the family of John Johnson, her sister's husband, where she lived in the capacity of a hired woman about eight years.—That said Harvey still continued to live at Lunenburgh, and resided with his uncle, Theodore Webb, until the spring of 1815, at which time he went with his said uncle to live in Lyman, in the State of New-Hampshire, and continued there with his said uncle two years, and then went into the State of New-York, where he remained till the fall of 1829, when he came with his family to reside in Bradford.—That when he went into the State of New-York he had not been married.—That as soon as said Sally went to live in said Johnson's family, he hired her, and at first gave her 2*s*. 6*d*. per week, and kept a

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child, which she took with her to said Johnson's, about four years old; but in the winter said Johnson gave said Sally less, as he paid for schooling said child: and after six months he gave her more, and continued to give her sometimes more and sometimes less, depending on her health, and business she had to do.—That said Johnson kept a regular account with said Sally of every thing.—That said Sally resided about eight years with said Johnson at said Newbury, and *she was not warned out of town.*—That said child resided at said Johnson's with his mother about six years, as one of said Johnson's own children.—That said Sally requested said Johnson to instruct said child (being a boy) in farming business.—That said boy was feeble at first, but was soon able to drive said Johnson's cows, and afterwards labored some on the farm.—That said Johnson had two farms in said Newbury; and said Sally kept house for him, sometimes at one place, and sometimes at another.

In view of the facts in this case, the Court decide, that the last place of the said Harvey Webb's legal settlement in this State is in said Lunenburgh: Therefore, the Court affirm the order of removal, and adjudge the said Harvey Webb, and his wife and family, as mentioned in said order of removal, were duly removed by the justices.

To which decision of the County Court, the Overseers of Lunenburgh excepted. The exception is allowed, and the case ordered to pass to the Supreme Court.

John Mattocks, for Lunenburgh.—1st. The mother gained a settlement in Newbury by residence. This, it is supposed, will scarcely be denied.

2d. The pauper being a minor, not having gained a settlement for himself, not married, and having contracted no connexion or engagement inconsistent with parental control, was not emancipated; and therefore took a derivative settlement from the mother, notwithstanding he did not live with her.—1 Chitty's Black. 271, note.—4 Com. Dig. 617–18.—3 Burns' Just. 334.—3 T. R. 116.—*King* vs. *Edgeworth*, same, 353.—*King* vs. *Wilton & Twambrook*, same, 355.—8 T. R. 479.—*Charlestown* vs. *Boston*, 13 Mass. 469.—*Springfield* vs. *Wilbraham*, 4 Mass. 135.—*King* vs *Rotherfield Grays*, 8 C. L. R. 95—same vs. *Hardwick*, 7 C. L. R. 62—same vs. *Wilmington*, same 180.

3d. It has been said, that our statute, directing Judges of Probate to appoint guardians to minor children, takes them out of the control of the mother. *Answer*. 1st, In England, the principles of guardianship are somewhat obscure: the King is guardian to all minors, lunatics, &c. and the Court of Chancery has in modern times assumed the authority to appoint guardians at pleasure, and the ordinary appoints guardians to the property of minors before distribution—Hargrave's Coke Lit. 89, and note 12.—1 Black. 369—and the father or mother is guardian *de jure naturali*—3 Salkeld, 175.—2 Kent's Com. 181—yet the mother, as such, is entitled to no power over the children—1 Black. 360. The reason of these decisions would seem to be the natural, not the legal control of the mother over the children. 2d, In Massachusetts, the probate acts direct the appointment of guardians to minor orphans, much like our statute—2 Dane, 4–5–6–7–8–9–12. And yet their decisions are in conformity to the English—see authorities cited under 2d head. And as Judges have often said that there is no equity, and uniformity is the principal object, and as we look to adjudged cases for most of the constructions we put upon our pauper statutes, it would be extremely dangerous to vary on account of any slight difference between our general laws and the English. Besides, the general principle is founded on good policy and natural feeling, that minor children should be settled where the head of the family is settled, to save painful separations, which would not be lessened, but increased by the death of the father; and otherwise, in many cases, the mother would have a settlement, and the children none.

4th. The case does not show any administration of the estate of the pauper's father, nor any appointment of guardian to the pauper; and it will not be presumed. But, if it will vary the case, Lunenburgh asks leave now to shew negatively that none was appointed.

Marsh, Collamer and Chase, for Bradford.—It may be doubted whether Sally Webb, the mother, acquired any settlement in Newbury, by the manner in which she resided there in the family of Johnson.—Act 6th Nov. 1801, Old Stat. 400.

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I. The more important question is whether, allowing she did acquire a settlement in Newbury, she communicated that settlement to her son, the pauper.—2. Bott 24.

The mother while residing in Newbury, was not a housekeeper. Her children could not be said to be a part of her family, and as such could not gain a settlement. 2 Bott 24.

In the *King* vs. *Lauton*, the Court say the true distinction is, that when the children have gained no settlement, but continue a part of their father's family, they shall follow their father's settlement.

The doctrine of this case clearly is, that when the father or mother lives as a domestic in another family, though perhaps under our statute, he or she may acquire a settlement by such residence, yet such settlement is not communicated to the children.—2 Bott 31.

In *St. George* vs. *St. Catherine*, it is said that the settlement acquired by the wife after the death of her husband, is communicated to such of her children as have never before gained a settlement for themselves.

But in examining the case it appears that the mother after the death of the father went with the children, the paupers, into St. George's, and rented a house at £12 a year and resided there with the children long enough to acquire a settlement, and that this settlement was therefore communicated to the children as part of her family. This case therefore seems to confirm the position taken above. 2 Bott 32.

The case of the *King* vs. *Woodard* was decided on the authority of the last case, and is to the same effect—but in those cases it appears that stress is laid on the circumstance that *the children resided with the mother when she acquired the new settlement.*

The reason why children do not take the settlement of the mother, acquired by marriage, is that (except for nurture while under seven years of age) they are not a part of her husband's family nor under his control. 2 Bott 37.

The *King* vs. *Barton* goes expressly on the ground of the two cases last cited. The pauper sesided with his mother as a part of her family, while she was acquiring a new settlement in her own right.

It is believed that no case can be found where the newly acquired settlement of the mother was transferred to the child, except when the child resided with her as a part of her family and was thus under her control.

The case of the *King* vs. *Outon* was decided on the same ground. 2 Bott 40.

There is another class of cases, where the father never acquired any settlement, and where the maiden settlement of the mother or the settlement of her ancestors is adjudged to be the settlement of her children; but this is entirely on another principle.

II. It is contended in this case that the pauper, Harvey Webb, was emancipated from his mother, and would therefore derive no newly acquired settlement from her. To this point the following cases are relied on: 2 Bott 42, *East Woodhay* vs. *West Woodhay*; *St. Michael* vs. *St. Mathew*, 2 Bott. 44; 1 Burrows Sett Cases, 444, *King* vs. *Coldashton*, cited in 2 Bott. 46.

The case of the *King* vs. *Walpole*, is exactly in point.—The pauper at about the age of 20 enlisted into the army for four years, and became emancipated thereby from his father and family. While in the army his father had acquired a new settlement in Walpole. The pauper never removed to Walpole; he had acquired no settlement of his own. The order was quashed on the ground that the paupers legal settlement was at ——— which was the place of his father's settlement at the time he left the family. The son by enlisting himself and serving 4 years, became emancipated from his father's family. 2 Burr, 48.

By several successive cases in Bott, it appears that, though a child does not actually reside with his father, yet if he makes his house his holiday home, or with other relations by his father's request, or is hired out and his father takes his wages, or is indeed still under the control of his father, he is not thereby emancipated, but will follow his father wherever he acquires a settlement. Bott 50, *Rex* vs. *Halifax*; *Rex* vs. *Tottingham*, 51; *Rex* vs. ——, 54; *Rex* vs. ——, 55; *Rex* vs. *Offchurch*, 57.

In the case before the Court the pauper was seperated from his mother when she removed to Newbury in September 1814, and was never after in her family or under

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her control, and we think was to every intent emancipated from her. In 1816 or 17 he went out of the country and was married and did not return till 1829. 2 Bott, 42.

In *Dumbleton* vs. *Beckford*, the point now in question seems to be settled. A girl thirteen years old living in Dumbleton with her grandmother, was removed to Beckford where her father had a settlement. It did not appear in that case that the girl or her father ever had a settlement in Dumbleton; yet the Court quashed the order, because by possibility she might have had a settlement there.

We think that the likeness of that case to the case now before this Court is worthy of notice. It does not appear in that case that the girl was ever in the place of her father's settlement, nor that the boy, in this case was ever in the place of his mother's settlement. She was not dependent on her father, at the age of thirteen for protection, support, instruction or advice; nor does it appear they had any knowledge of each other; and that is precisely the case with the boy and his mother, when he was seventeen years old, after she left him at Lunenburgh, until she died and he left the state. The Court said the girl might have a settlement at Dumbleton; and might the boy have a settlement at Lunenburgh? It is certain that the father had a settlement there and left it as an inheritance to his children, and his son Harvey never abandoned it for a moment till he left the state.

Dane says, when a father ceases to have any control over his children or any right to their services, it is not easy to devise any good reason why they should not be emancipated, and as no longer having a derivative settlement with the father on his gaining a new settlement; and when the reason ceases, the law founded on that reason ceases also. 2 Dane's Abr. 107, Sec. 15.

The cases relied on by the counsel for Lunenburgh, we think are not in point.

But we feel quite sure on the following point. That according to the laws of this State the *mother has no control over her children after their period of nurture is past, nor any title to their services.* They are therefore, from the death of their father, if past seven years of age, emancipated from their mother, according to the principles of all the cases before cited.

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By the statute the judges of probate are empowered to allow of guardians, that shall be chosen by every minor of 14 years of age and to appoint guardians for such as shall be within or under that age, and to take bonds to account to the judge or minor when he shall arrive to the age of 21 years, &c. And by another section the guardian is to make and exhibit an inventory of the estate of his ward, both real and personal &c. In short, the statute gives the guardian the entire care and custody both of the person and property of the minor, to such extent that the mother is entitled to neither, and of course not his services.

All the English authorities lay much stress on the question whether the child is or is not under the control of the parent. When he is so, whether residing directly with the parent or not he is not emancipated. But if from the connections he may have formed, or from enlistment, or other circumstances he is removed from the control of the parent, he is emancipated, and no longer takes a newly acquired settlement of the parent. The two cases relied on from 4 & 13 Mass. Rep. make this circumstance a turning point in each of those cases.

If then, by our laws the mother has or can have no control over the person, nor is entitled to the services of her children, the only ground for their taking the mother's settlement, acquired after the death of her husband, entirely fails. See 15 Com. Law Rep. 216, *Rex* vs. *Lawford*.

The opinion of the Court was pronounced by

BAYLIES, J.—The pauper's father had a legal settlement in Lunenburgh, where he resided with his family fourteen or fifteen years, and then died.

The pauper's mother, in 1814 and '15, after the death of her husband, and during her widowhood, gained a legal settlement in Newbury, by one year's residence in that town, without being warned out, according to the act of November 6th, 1801.

The pauper, while his mother was gaining her legal settlement in Newbury, resided in the family of his uncle, at Lunenburgh, and was 16 or 17 years of age.

It does not appear from the case, that the pauper, after the death of his father, had any other guardian than his mother, who was his natural guardian.

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We are now called upon to decide where the pauper had his legal settlement.—Was it at Lunenburgh, where his father had his last legal settlement; or was it at Newbury, where his mother gained her's?

Neither the act of 1797, nor the act of 1801, respecting legal settlements, says one word about a legitimate child deriving a settlemeent from its father, or mother, or from both of them, in this State. But the act of 1797 did say, that "every bastard child shall be deemed and adjudged to be settled in the town or place of the last legal settlement of his or her mother."

The act of 1817 says, "legitimate children shall have the settlement of their parents."

But it is not to be inferred from this, that a legitimate child, before 1817, could not, in this State, derive a settlement from its father or mother, according to the principles of the common law.

I entertain no doubt on this subject. Every legitimate child born after 1797, and before 1817, who was not twenty-one years of age, and was not *emancipated*, and whose parents had a legal settlement in this State, under the act of 1797, or the act of 1801, did derive a settlement from his parents, according to the common law; that is, from his father; or, if he be dead, then from his mother—she having acquired a new settlement by residence; and not by marriage.

A man settled in St. Katharine's, married, and had six children born there, and died; after his death, the widow went into the parish of St. George with her six children, and rented a house at £12 a year, and lived in it with her children four months. The single question was, whether the children should be settled where their father was last settled, or have a settlement with the mother in the parish of St. George. And the whole Court were of opinion that the six children were settled in the parish of St. George, where the mother's last settlement was; and by *Parker*, C. J. There is no distinction between the settlement of the children with their father or mother; for they are as much her's as the father's, and nature obliges her as much as the father to to provide for them—so does the law; and every argument that holds for their settlement with the fa-

ther, holds as to their settlement with the mother. The reason why children shall not gain a settlement where the widow gains a settlement only by intermarriage is, because it is not then the mother's family, but her husband's; and she cannot give the children any sustenance without the husband's leave; but, in this case, since she is equally punishable with her husband for deserting her children, and therefore could not leave them behind her, they must gain a settlement with her."—*St. George* vs. *St. Katharine*, 14 Petersd. 438, No. 5.

What is said above, is recognized as law, in the case between the parishes of *Paulsbury* and *Woodon*, 2 Strange, 746; though in this case, the Court said, "if it had been *res integra*, they should have doubted whether a settlement, gained under the head of the family, could be divested by a derivative one from the inferior."

But in the case of *Dedham* vs. *Natick*, 16 Mass. Rep. 135, *Wild* J. says, "Notwithstanding the doubt expressed by the Court, in the case last referred to, (between *Paulsbury* and *Woodon)* I think the *English* decisions are conformable to the general principle, in respect to derivative settlements. The mother, after the death of the father, remains the head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separated from her.

"These considerations appear to me sufficient to relieve the *English* decisions from all doubt, and to show that the law here was the same as it was in *England*. It did not there depend on the provisions of any act of Parliament; but on the principles of the common law."

In the case between *Bozrah* and *Stonington*, 4 Con. Rep. 373, *Hosmer*, Ch. J. says, "The settlement of the pauper, during his minority, and until he has become emancipated, equally follows that of the father, and that of the mother, acquired in her own right. If of sufficient ability, the obligation of a mother to provide for her children is the same as that of the father; and hence, on the same principles, a settlement is indifferently derived from either."

We see by the authorities quoted and referred to, that a minor may derive a settlement from the last settlement of

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his father; or if his father be dead, and his mother, without marriage, acquires a new settlement, the minor may derive his settlement from her's. But if the minor be emancipated, he cannot derive a settlement from a settlement of his father or mother, acquired after his *emancipation*. This leads us to inquire, What is *emancipation?*

A child is not emancipated by separation from his parent, and therefore follows the parent's settlement, as part of his family, until it—1, is of age—2, has married—3, has gained a settlement for himself—4, or has contracted a relation inconsistent with the relation of parent and child; and by which, therefore, the parent loses all authority over him.—*Rex* vs. *The Inhabitants of Edgworth*, 3 T, R. 353.—*Rex* vs. *Inhabitants of Wetton cum Twambrookes*, Id. 355.—(See 14 Petersdorff, 441, *n.*)

A boy was hired by the week, and served as a weekly servant for two years, after which he obtained his own living by mole-catching, and occasionally visited, but never resided with his father's family; nor did his father exercise any control over him. He was held not to be emancipated, but to follow his father's settlement, acquired during his minority.—*Rex* vs. *Wilmington*, 5 B. & A. 523.

A daughter was separated from her father at the age of four years; she lived with, and was maintained by her grandfather, and entirely supported by him until his death, when she was seventeen. The grandfather devised the residue of his estate in trust, to pay the interest to his wife for life, who was thereout to maintain and educate this girl; and after the wife's decease, if during the girl's minority, the interest was to be applied to maintain and educate her; and upon her attaining twenty-one, the principal to be paid to her; or, in case of her death, to her issue. The Court held her not to be emancipated during her minority by these circumstances; for this separate provision could not deprive the parent of the right to the care and custody of his child, nor could it relieve him from the duty of maintaining her; and there can be no doubt, that while under twenty-one, she would follow her father's settlement.—*Rex* vs. *Uckfield*, 5 M. &. S. 214.—(See 14 Petersd. 318.)

In the above case, 4 Con. Rep. 373, *Hosmer* Ch. J. says,

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"Whether the pauper was actually residing in the family of the mother, is no material question; but the only inquiry is, was he emancipated? If having attained the age of twenty-one years, he has left his parents' house, or has become married, or has gained a settlement in his own right, or has contracted a relation inconsistent with the idea of a subordinate situation in his parents' family, his emancipation is complete, and he has secured the tie, which might confer on him a settlement by derivation."

The pauper in this case was only 16 or 17 years of age, when his mother gained her new settlement in Newbury; and he was not married till a number of years afterwards. And before his mother's new settlement, he had gained no settlement for himself, nor contracted any relation inconsistent with the relation of parent and child, by which his mother lost her parental control over him.

This being true, it cannot be said he was *emancipated*, and could not derive a settlement from the new settlement of his mother. His being married a number of years afterwards, could not have a retroactive operation, and deprive him of his newly acquired settlement. His living with his *uncle*, while his mother was gaining her new settlement, and several years afterwards, is no evidence to show that he was *emancipated*. It is not necessary to decide, what would be the effect, if the pauper was under guardianship, when his mother was gaining her new settlement; for the case does not show that there was any guardian appointed.

On the whole, I am satisfied, that the pauper, mentioned in this case, was never *emancipated*, before his mother acquired her new settlement in Newbury, by residing there one year without being warned out of town; and that he derived a settlement from that new settlement of his mother in said Newbury in the year 1815, which appears to be his last legal settlement in this State, to which he ought to have been removed. The said order removing him from Bradford to Lunenburgh is erroneous, and must be quashed.

HUTCHINSON, C. J., *dissented*.—I cannot view this decision as correct, either by the authorities in England, or the rights and powers which our law seems to establish.

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It seems a settled rule, in England, that every person, born there, has a legal settlement in some town or parish, to which there may be a removal, in case of becoming chageable. Every legitimate child, if its parents are foreigners, or have no legal settlement in England, has its settlement where born. If the settlement of the parents be in England, and be known, there the child has its settlement. If neither the settlement by birth nor parentage be known, its settlement is where its existence is first known. If the mother has a settlement in the realm, at the time of her marriage, and the father has no settlement in the realm, the children take the settlement of the mother. And a settlement once gained, in either of these ways, continues till another is gained.—See 2d Bott's Poor Laws, p. 13, 14 and 15.

The first settlement of the pauper, who is the subject of this controversy, was clearly in Lunenburgh, and so continued to be, till after the decease of his father, and till after he, the pauper, arrived at the age of fourteen years; the age at which he had a right to choose his own guardian.

The question now is, Did he lose that settlement, and become settled in Newbury, by his mother's leaving him at Lunenburgh, and going to Newbury, and residing there a full year, without being warned to depart according to the provision of the statute then in force?

This leads to the consideration of derivative settlements.

In one state of things, applicable to these, all the authorities agree. That is, children, moving with the father, and living as a part of his family, where he gains a new settlement, take that new settlement with the father. So, if they do not live with the father, but are under his control, and are living where, and as he directs, and do not become emancipated from him, it is considered the same as living with him. But, if they gain settlements for themselves, which they may do in various ways after they are seven years of age, in England, by this they lose their primitive settlement, and do not take the newly acquired settlement of the father. So far is this carried in England,

that an order of removal, removing one, who is much over seven years of age, to his primitive settlement, will be quashed, unless it contains a negative of his having acquired a settlement for himself. I think, however, this would be more analogous to other decided cases, if the Court required proof, of such newly acquired settlement, to come from the other side.

The authorities seem to suppose, that emancipation may take place by the minor's living away from the control of the father; but I recollect no decision to that effect.—And, on the other hand, a man, coming of age, and moving with his father, and forming a part of his father's family while he acquires a new settlement, takes that settlement; and is not considered as emancipated. But, when of age, he is considered emancipated of course, unless he does continue to be a part of his father's family.—See 2d Bott, p. 42.

Many cases are cited by the counsel, where it is decided, that children derive from their mother the settlement acquired by her, in her own right, after the decease of her husband.—See 2d Bott, p. 29, and to 33. On the thirty-first page the Court say, "There is no distinction between the settlement of children with the father or mother; for they are as much her's as the father's; and nature obliges her as much as the father to provide for them; so does the law; and every argument that holds for their settlement with the father, holds as to their settlement with the mother." Something like this is also expressed in some of the other cases. Yet I find no case, in which it was decided, that children thus take the settlement acquired by the mother, after the father's death, where the facts are stated at all, but what the facts were, that the children went and resided with the mother as a part of her family, or were in every sense under her control. Where the children had a legal settlement in England at the decease of their father, whether acquired by birth, the parents having no settlement; or whether by taking their father's settlement; or by taking that of the mother before her marriage, the father having no settlement; wherever such settlement is lost by their having taken that of their mother, acquired after the decease of the father, it is where they remain a

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part of the mother's family, and under her control while she acquires this new settlement in her own right: I say *in her own right;* because she can acquire no settlement for her children by a marriage with a second husband. She takes the settlement of her new husband for herself; but she does not communicate it to her children by a former husband.

If the reasons, before recited, for children's taking the after settlement of the mother, are given only in the cases where they remain under her control, and usually remain a part of her family, is it not fairly to be inferred, that, when they do not make a part of her family, and are not under her control, they are considered as emancipated, and do not take her newly acquired settlement? I must consider this a fair inference, till I discover some one case, in which the children have been adjudged to take the newly acquired settlement of the mother, though they were not a part of her family, nor under her control, when she acquired it, nor afterwards.

We may consider, for a moment, how that reasoning, thus adopted by the Courts in England, applies in this State. Our Probate Act is very particular in its provisions for the settlement of estates. It provides for the appointment of guardians over children till they are fourteen years of age: for the support of children till they are respectively seven years of age, from the estate of the deceased; and for minors, over fourteen years of age to make choice of their guardians, before the Judge of Probate can make any appointment. When these guardians are appointed, they have the control of the ward; and must take care of the property, if any: and all the earnings belong, not to the mother, but to the ward. Unless she is appointed guardian, she has no control, against the guardian, either of the person or the property. If she is appointed guardian, she must account for the earnings of the ward the same as if she was not his mother.

The mother of this pauper was never appointed his guardian. She went to Newbury to live among her relations, and carried one or two other children with her. These she had under her control, though she made no attempt to keep house by herself and children. The pauper remained

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for a time at Lunenburgh, where his legal settlement was. He then past some time with his uncle over the river, in New-Hampshire—then went to the State of New-York, and tarried till he was 29 years of age; when he moved into Bradford, where he clearly has no settlement. When he was thus left at Lunenburgh, he was over fourteen years of age; and, of course, had a right to choose his own guardian. It does not appear that he has ever seen his mother since that time; nor does it appear that he ever was in the town of Newbury in his life.

Now, in what class of cases should this pauper be considered? Surely not as belonging to his mother's family, when she gained her settlement in Newbury: for he was in no sense whatever a part of her family; nor in any degree under her control.—She had no right to such control: She made no attempt to exercise it. He was most clearly emancipated: as much so, as any man, at the age of twenty-one years, becomes emancipated by living no more with, or under the control of his father. The rule is, that a person, having a legal settlement, loses it only by gaining or deriving a new one. He takes a newly acquired settlement of the father, if not emancipated, and if he has gained none for himself. But, if either emancipated, or acquiring a settlement for himself, he does not take the new settlement of his father. This pauper's settlement was in Lunenburgh. He does not appear to have gained any other for himself. He became as fully emancipated from his mother, from and after her leaving him at Lunenburgh, and going herself to Newbury, as if he had then been twenty-one years of age. He was as far removed from her legal and actual control. His legal settlement remains at Lunenburgh. This appears to me as plain as any cause we have ever decided. When it first came up in the County Court, we considered it by no means free from difficulty. But I devoted much thought to it there, and came to the result I have now suggested; and have discovered no view of the case, nor any new authorities, which vary my opinion at all. Yet I must suppose my brethren more correct. They are well agreed in the decision they have made.

ESSEX, *March*, 1833.

DAVID E. DENISON *vs.* SILAS HIBBARD.

A., a common carrier, received money to carry, and deliver to *B.*, a common carrier, for him to transmit to C., the owner. C. sues A. for the loss of the money, and after *A.* had given evidence tending to prove that he delivered the money to B., as he was dicected, C. offered B as a witness to prove that he did not receive the money.

***Held*, that B. had a deep interest in the *particular question* agitated at the trial, and could not testify, without a release from C.**

This was an action of *assumpsit*, charging the defendant as a common carrier. The defendant pleaded the *General Issue*. The issue was joined to the country, and on trial, the plaintiff gave evidence tending to prove, that the defendant was a common carrier from Danville, Vermont, to Littleton, in New-Hampshire; and that *Josiah Grant* was the servant, or agent of the defendant in that business; and as such servant, or agent, the plaintiff delivered said Grant *seventy-seven dollars* and *thirty-four cents*, to be safely carried from said Danvllle, and delivered to *Heman How*, at Waterford, Vermont, who was a common carrier, to transmit to the plaintiff.

And the defendant, to support the issue on his part, gave evidence tending to prove, that said Grant did faithfully discharge his duty as such servant, or agent of said defendant, and did faithfully carry said money from said Danville to said Waterford, and there deliver the same to said How, which was all that was required of the defendant to do and perform; and that said money, if lost, was not lost by the laches or default of the defendant.

The plaintiff, for the purpose of showing that said money was not so delivered to, and lost by said How, but was lost by the defendant, offered said How as a witness; and the defendant objected to the admission of said How as such witness, on the ground that he was interested in the event of said cause, the plaintiff not having released or discharged said How from his said interest, or liability. But the Court overruled said objection, and admitted said How to testify; and said How did give evidence tending to prove, that said money was not delivered to him by the defendant, or his said servant, Grant; and that if said money was lost, it was by the default of the defendant, or his said servant. The jury returned a verdict for the

plaintiff. To which decision, and admission of said How to testify, the defendant excepted. The exception was allowed, & the cause ordered to pass to the Supreme Court for their decision.

The defendant, by his counsel, relied on the following authorities: *Green* vs. *The New River Company*, 4 T. R. 689. In an action against a master for the negligence of a servant, the latter is not a competent witness to disprove the the negligence without a release. *De Symonds* vs. *De Lacour*, 2 W. R. 374—Captain of a vessel and part owner may testify as to her original destination; for in this question, he has no interest; but he cannot testify as to her deviation, for he is liable to the other part owners, if any loss has happened by such deviation.

Rotherse et al. vs. *Elton*, Peake, 85—*Assumpsit* on policy of insurance of plaintiff's goods. The question was, whether the ship was sea-worthy or not. The owner of the ship was called as a witness. *Erskine* objected, that he was interested in the event of the suit: he comes to exonerate himself from the action, which the plaintiffs will have against him, if they fail in this action; for the law will imply a warranty on his part, that the ship was staunch. Ld. *Kenyon*, J.—This witness is directly interested, in the manner mentioned by Mr. *Erskine*.

Miller vs. *Falconer*, 1 Camp. 251.—Case for negligence in running against plaintiff's cart with a dray. The first witness called was the servant, who drove the cart, when the accident happened. The witness was objected to. Ld. *Ellenborough*.—The witness certainly comes to discharge himself, and therefore ought to be released.

——— vs. *Foote*, 8 Taunt. 454.—Case for negligently driving a small coach against the plaintiff's waggon-horse, whereby it died. Held, that the plaintiff's waggoner was incompetent to prove the negligence of the defendant without a release from his master.

The plaintiff, by his counsel, contended,

1st, That a bare possibility that an action may be bro't against a witness, does not exclude him.—1 Swift's Dig. 740.—1 T. R. 163.

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2d, How's interest is equally balanced, and he therefore is a competent witness.—1 Swift's Dig. 742.—14 T. R. 79.—7 T. R. 480.

3d, Persons may be witnesses who are agents, and liable to suits.—1 Swift's Dig. 741-4.—1 Black. R. 366.—2 Strange, 1069.

4th, Servants and brokers, who receive money for their masters, are competent witnesses.—1 Swift's Dig. 744.

The opinion of the Court was pronounced by

Baylies, J.—One of the best writers upon evidence, says, "It is now clearly established, that no interest in any disputed question will render a witness incompetent, who is not interested in the particular result, or in the record. There is, however, a considerable class of cases, where a witness is not, by reason of his connexion with the parties, or the subject matter of litigation, generally incompetent, but where he may be rendered incompetent by the nature of the *particular question* agitated at the trial. This happens where the event of the cause turns upon the question, which, if decided one way, would render the witness liable over to one of the parties, but where a contrary decision would protect him.

"Thus, in an action on a policy of insurance on goods, the Captain of the vessel has not, in the abstract, any interest either in the immediate result of the cause, or in the record; and if the question were merely to be what was the original destination of the ship, he would be a competent witness for the plaintiff, to show that he acted under his direction. But if the question turned upon a deviation, he would be incompetent to prove that he had not been guilty of a deviation; for if the plaintiff failed, he would be responsible to him for the consequences of such deviation, and he would then labor under an interest in the event of the suit.

"In this and similar cases, it is to be observed, that the incompetency does not arise from the general relation of the witness to the parties, or from a direct interest in the immediate event of the suit, or in the record; for he is competent for general purposes. It is the particular question, and the consequent liability of the witness in one e-

vent, turning upon the question, which generates the objection.

"When the event of the cause depends on the question of the witness's misconduct, the case is the same, as far as regards his competency, as if the sole issue had been joined upon that question.

"And in general, where the plaintiff, in order to recover, must prove the performance of some duty, or contract by a party, whom he has employed, the latter is not, it *seems*, a competent witness for the plaintiff to prove the performance of that duty, or contract; for upon failure in such proof, he would be responsible to the plaintiff for the consequences of his own misconduct, or breach of contract; or, perhaps more properly, it should be said, that by means of such proof, he would avert the consequences of his misconduct.

"Where, however, the party so employed was the actual agent, who transacted the business of the principal, he is, as has been seen, competent on the score of *necessity*; but although an agent, who actually executed the business of his principal is, it *seems*, in all cases competent to prove that he acted according to the directions of his principal, on the ground of *necessity*, and because the principal can never maintain an action against his agent for acting according to his own directions, whatever may be the result of the cause, yet if the cause depend upon the question, whether the agent has been guilty of some *tortious* act, or some negligence in the course of executing the orders of the principal, and in respect of which he would be liable over to the principal if he failed in the action, the agent is not competent without a release."—3 Starkie's Evidence, 1728–29–30.

When we examine the bill of exceptions in this case, and learn what was the *particular question* agitated at the trial, we cannot but perceive that *Heman How*, the witness, had a deep interest in that question. The question was, did How, as a common carrier, receive the money of *Josiah Grant*, to transmit to the plaintiff, as Grant testified? If How so received the money, he was liable to the plaintiff for it; and it was for his interest to testify, that he did not receive the money, and to charge the defendant with the

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loss of it, so as to exonerate himself from any liability to the plaintiff. Being thus interested, it is obvious that he was not a competent witness without a release.

The judgement of the County Court is reversed, and a new trial is granted.

Essex, *March*, 1833.

Binney & Broadhead vs. Daniel Plumley.

A note given to A. & B. as trustees of a corporation, must be sued in their names as trustees, and not in the name of the corporation; for they have the legal interest in the note.

But mere Servants or Agents making contracts for a corporation, cannot, in general, sustain actions on such contracts; but the same must be sued by the corporation, which has the legal interest in such contracts.

The averment in a declaration, that the defendant by his note, under his hand of that date for value received, promised to pay &c." implies the delivery of the note.

As the words, that the defendant, "by his note in writing under his hand &c." imply that the defendant made the note.

It is not necessary to raise a promise from the defendant's liability to pay the money contained in his note; but the plaintiff may declare that the defendant in, and by his note, promised &c.

This was an action of *Assumpsit*, commenced before a Justice of the Peace, and came up to the County Court by appeal, at the May Term, 1832. The plaintiff's filed the following declaration:

"In a plea of the case, for that the defendant at Barre, in the County of Washington, and State of Vermont, on the eleventh day of September, one thousand eight hundred and nineteen, by his note in writing, under his hand of that date, for value received, promised to pay the said Amos Binney and John Broadhead, plaintiffs, and their successors, Trustees of the New Market and Kingston Wesleyan Accademy, or their order, Twenty Dollars, in five years from the date thereof, interest be paid annually in the month of March. Yet although said time of payment has long since elapsed, said defendant hath not paid said note, nor any part thereof. To the damage of the plaintiff, as they say, fifty dollars, to recover which with just costs, they prosecute this suit.

To this declaration the defendant demurred specially and assigned the following causes:

In this case the defendant comes, &c. when, &c. and pleads and says, that the plaintiffs from having and maintaining their action aforesaid, against him, ought to be barred; because he says,

1st. That the action should have been brought in the name of the Corporation of New Market and Kingston Wesleyan Academy, and not in the names of the plaintiffs.

2d. That the plaintiffs have not averred a delivery of said note to them by the defendant.

3d. That the plaintiffs have declared upon the note as a specialty, whereas they ought to have alleged that the defendant in consideration of having made executed and delivered said note, undertook &c.

To this demurrer the plaintiff joined, and upon trial, the Court ruled, that the plaintiffs writ and declaration are sufficient, and that the plaintiffs recover their damages and costs, and rendered judgement accordingly. To which decision of the Court the defendant excepted. Exception allowed, and the cause was ordered to the Supreme Court for final decision.

The opinion of the Court was pronounced by

Baylies, J.—It is contended, that this action should have been brought in the name of the corporation of '*New-Market and Kingston Wesleyan Academy*,' and not in the names of the plaintiffs. But it does not appear, that there is a corporation of that name: We know of none in this State; and if one exists in *Massachusetts*, where the plaintiffs reside, the defendant should show it, by producing the act of incorporation, or by other legal evidence. This Court, without evidence, will not presume the existence of such a corporation. But admitting there is such a corporation, and the plaintiffs are trustees of it, and the note in question was executed to them, as such trustees, I conceive this action is well brought: The plaintiffs had the legal interest in the note, and should sue to collect the money.—See 1 Citty's Pleadings, 4.

If the plaintiffs had been *mere servants* or *agents* of the corporation, and had made a contract in their behalf, then the action should be in the corporate name.—(1 Chit. Pl.

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p. 4, and the authorities there referred to.) But it *seems* the plaintiffs did not act as *mere servants* or *agents*, who have no legal interest in their contracts; but acted as trustees, and took a legal interest.

The defendant also contends, that the plaintiffs have not averred the *delivery* of the note to the payees. It is not necessary in a declaration on a bill of exchange, to aver, that the maker delivered it: it is sufficient to state, that he *made* it; for these words imply a delivery.—*Churchill* vs. *Gardner*, 7 T. R. 596.

In the case at bar, the plaintiffs aver, that the defendant, "*by his note*, under his hand of that date, for value received, *promised to pay* the said *Amos Binney* and *John Broadhead*," &c. But how could the defendant effectually *promise* the plaintiffs *by his note*, without *delivery?* I consider, *delivery* is implied in the words "*by his note promised*," &c., and it was not necessary to aver it.

In Chitty on Bills, 531, *n.*, it is said, "The averment of the delivery of the note to the payee is not necessary," and refers to 7 T. R. 596, and 5 East. 476.

The defendant also insists, that "the plaintiffs have declared upon the note, as a specialty, whereas they ought to have alleged, that the defendant, in consideration of having made, executed and delivered said note, undertook," &c.

Whoever will examine Mr. *Chitty's* critical observations upon an *English* declaration by the payee against the maker of a promissory note, will perceive, that there is no set of words, or phrases, necessary to be used on every occasion, in making a declaration.—Chitty on Bills, 529 to 532.

The plaintiffs, in this case, have adopted a concise form of a declaration: they do not aver that the defendant *made* the note; but they aver that, which includes the *making*; namely, that the defendant "*by his note in writing under his hand*," &c. It could not be "*his note in writing under his hand*," unless he *made* it. The plaintiffs have not raised a promise from the defendant's liability to pay the money contained in the note, according to the *English* practice; but have declared, that the promise was made in and by the note itself, which is according to our practice.

On the whole, we consider the declaration sufficient, and the judgement of the County Court is affirmed.

George C. Cahoon, for the plaintiffs.
Cushman, Hibbard & Fletcher, for the defendant.

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Richard Stevens *vs.* Samuel A. Pearson.

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Additional reports or statements from referees, made after the report is filed, unless made by the permission of the Court, are to be disregarded

The Court will not set aside a report, where referees have mistaken the law, unless it appears that they intended to follow the law, and by mistaking it, have come to a wrong result.

Referees are sole judges of facts before them.

The *ad damnum* usually determines the jurisdiction of the Court

It is no objection to the report of referees that they have proceeded to trial without the pleadings, when neither party requested to have the pleadings produced.

Whether sufficient notice to the parties was given by the referees, is a question to be determined by the Court to whom the report is returned; and their determination thereon is not to be re-examined by a superior Court.

This was an action for money had and received, brought by the plaintiff, before Justice Fairchild, to recover $100. There were no pleadings before the Justice.—Judgement was rendered without trial, for defendant. Whereupon, plaintiff appealed to the County Court.

At the first term in the County Court, the defendant plead the *General Issue* and the *Statute of Limitations*. At the second term, this action was referred to *John Dewey*.—On short notice to the defendant, and without a full hearing of the case before the referee, at the May Term, 1832, said Dewey made report in substance, That said Samuel A. Pearson is indebted to the said Rich Stevens in the sum of $40,25, in full of the claims No. 1, 2, 3 & 4, as per *schedule, herewith returned* to the Court, exhibited by said Stevens against the said Pearson.

Further report—"I was the referee in the case *Stevens* vs. *Pearson*, and I made a report at the present term of Essex County Court.—*The evidence* in the *case* was *far from being satisfactory*, to the *referee*, and *I am fully sensible* that *injustice may have been done*, to the *parties* by the *report*.—

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From the evidence submitted to me, and the law as I construed it, the report must be right. *Still* there was a *deficiency* of *evidence* to *satisfy* the *referee, that either* of the *parties were certainly entitled to recover. No writ or pleadings in this case were shown* to me, *on the hearing.*

JOHN DEWEY.

Guildhall, May 31st, 1832."

Further report—"In the case *Stevens* vs. *Pearson*, I believe that the sum found due in my report of May 30, 1832, was one half of the fifty dollar receipt, and the interest on that half. I do not recollect that the plaintiff offered any evidence (except the receipts) to shew that the money had not been applied as specified in the receipts, or any other evidence to shew a demand on the defendant to apply said moneys; neither did the defendant offer any evidence to shew that the $25, being one half of the said fifty dollar receipt, had ever been applied. JOHN DEWEY.

November 23d, 1832."

Schedule of Claims, Stevens *vs.* Pearson, *annexed by Referee:*

$50,00	rec't dated March 22d, 1822.
10,00	rec't September 16, 1823.
5,70	rec't August 24th, 1827.
43,65	rec't by hand of Grinnel in full of *scire facias*, Feb. Term, 1830.
20,00	cash paid by Seth Cushman.
$129,35	JOHN DEWEY, *Referee.*

February 1, 1824.

The following *exceptions* to the report were filed at the May Term, 1832:

The said Samuel A. Pearson excepts to the report of John Dewey, referee in said cause, appointed by the Court, to settle and adjust this cause, for the following reasons, viz:—

1st, Because said Dewey did not hear, try, and determine upon the issues tendered by the defendant.

2d, That the amount of the demands offered by the plaintiff, and received, heard, tried and adjusted by the said Dewey, exceeded the jurisdiction of the Court, to hear, try and determine said cause, having come into this Court by appeal from a Justice—the amount of said demands exceeding $100, viz: $129,35.

3d, That said report is contrary to law and justice.—Wherefore, he prays said report may be set aside.

The Court accepted the report of the referee.—To which the defendant excepted; and the exceptions being allowed, the case was ordered to the Supreme Court.

Counsel for defendant contended—1st, Reports of referees may be allowed and accepted, unless cause shall be shown to the contrary—Vt. Stat. p. 81—which clearly implies that if justice is not done to both parties by the report, the Court ought and will recommit or set aside the report.

2d, It has been the ancient and constant practice and usage of Courts, when rules of reference are granted, to recommit matters referred, to the same referees, at a subsequent term, or to reject the report.—Mass. Rep. Vol. 6, p. 70.

3d, If either of the parties, in a rule of reference, without any fault on his part, have not had a reasonable opportunity to have been heard, it is the usual practice to recommit the report.—6 Mass. R. 70.

4th, The report ought to be set aside, because the referee, intending to follow *the law*, has gone against *law*.—3 Vt. R. *Johns* vs. *Stevens*, 315.

The questions of law appear sufficient upon the face of the report.—They necessarily arise out of it.—The Court must take notice of them.

The report is wrong upon the referee's own shewing.

Counsel for plaintiff contended, That a general report is good, unless fraud or corruption be shewn.—3 Vt. R. 314.—Same, 536.

A Justice has Jurisdiction, when the debt or other matter in demand does not exceed $100.—Comp. Stat. Vt. 536.

Ad damnum in writ governs.

The additional reports are not to be considered.—They were obtained without knowledge of plaintiff.

The opinion of the Court was delivered by

Williams, J.—The question now before us is, whether the County Court erred in accepting the report of the ref-

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erees. The first report made by the referee appears to be a general one. There are two additional reports made by the same referee. If these were made by the permission or direction of the County Court, they are to be received as part of the original report. If they have been procured from the referee after the first report was returned into and filed in the County Court, without the order or permission of the Court, they ought to be wholly disregarded. We have not directed an examination of the records of the County Court to ascertain this fact, as we cannot discover any reason from the whole together, why the report should not have been accepted.

The Court ought not without very substantial reasons to set aside the report of a referee. Referees are usually selected by the parties, with a view to settle the disputes between them, and are rarely selected for the purpose of making an accurate legal determination of the matter in dispute. The rules upon which Courts have proceeded in considering the reports of referees have been frequently declared from the bench; and it must be understood that these reports are always to be reexamined upon those rules alone, and that it will never be sufficient to present the whole facts to the Court and ask them upon a critical examination, to decide whether a different conclusion might not have been drawn from the testimony.

We cannot discover in this case, that the referee has attempted to follow the law and has mistaken it, or that he has on the principle on which he professed to act, come to a wrong conclusion.

The referee was unquestionably the judge of the weight of evidence. In speaking of the result to which he arrived, he expresses himself with a degree of modesty and difidence, which is certainly much to his credit. He says the evidence was far from being satisfactory, is sensible that injustice may have been done and that the evidence was not such as to put the case beyond all doubt, or to show that either party were certainly entitled to recover; but still from the evidence as submitted and the law as he understood it, the report must be right.

From the second statement made by the auditors it appears, that the sum allowed the plaintiff was one half of a

certain receipt executed by the defendant; and the referee does not recollect whether the plaintiff offered any evidence to show that it has not been applied as directed in the receipt, nor did the defendant show by any evidence, that it had been applied. The referee may have concluded that as the defendant could very easily show the application of the money, according to the terms of the receipt, that the burden of proof was on the defendant, and if there was any evidence before him that the defendant; as attorney of M. & W. Harris, had collected the whole of that execution, the conclusion to which he arrived was the legitimate conclusion from the evidence. But be this as it may, the referee was the judge of the evidence, and the case is not so presented by the report, that we can learn that there was any error of law, or fact, in the decision upon the evidence.

The question which has been raised as to the jurisdiction of the Court is very easily answered. The *ad damnum* determined the jurisdiction. The sum then demanded was all the plaintiff could recover and all that he claimed. In his evidence, he exhibited a variety of receipts, and amounting in the whole to the sum of one hundred and twenty-nine dollars and thirty-five cents. From these he intended to establish his claim to the seven demands in the declaration. He did not claim the whole amount of those receipts as due from the defendant, nor if he did, would it have prevented the Court from rendering judgement for any amount within the *ad damnum*.

Either party could have had the pleadings before the referee if he chose; and need not have proceeded without. It was not made to the referee an objection to his proceeding without them; nor can it here be assigned for error in his report that he did proceed to trial without them.— Neither can it be assigned for error that the defendant had not reasonable notice of the time when the referee was to hear the cause. This should have been presented to the County Court as a reason why further time should be given for the hearing, and the Court might at their discretion have ordered that the rule be enlarged for that purpose; or if the plaintiff had refused to consent to such enlargment, they would have set aside the report, but this was a ques-

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tion to be submitted to the sound discretion of the County Court.

The judgement of the County Court is therefore affirmed.

Wells, for plaintiff.

Fletcher, for defendant.

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Samuel B. Cooper *vs.* John L. Ingalls.

A justice writ is not to be abated because it is not directed to any constable of the county, conformable to the statute, passed in 1831.

A return of *non est inventus*, made by an officer, after an execution has run out in his hands, with a view to charge bail on *mesne process*, is a false return.

When a recovery has been had against the bail, on a writ of *scire facias*, issued against them, and the bail brings an action against the officer for making a false return on the execution, it it is no defence to such action that the bail might have successfully resisted the recovery against him, by shewing that the return was false.

This was an action on the case, brought against the defendant as constable of Canaan, for making a false return on a writ of execution in favor of James Steele and against Russell Frizzle, on the 14th day of April, 1832.—"That said constable could not find the person or property of the said Russell Frizzle within his precinct, whereon to levy said execution:" therefore he returned said execution in no part satisfied. The execution was dated 15th February, 1832, and was made returnable in sixty days. It appeared that after this return, said Steele, by *scire facias*, sued plaintiff as bail for said Russell—plaintiff having endorsed the original writ; and in this action, said Steele recovered against the plaintiff $6,61 damages, $5,91 costs, and 25 cts. execution, all amounting to $12,77, which plaintiff paid, and suffered additional costs and trouble in defending. Plea, *not guilty;* and issue joined to the country.

On the trial of said issue, the plaintiff gave in evidence regular attested copies of the records of the writ of attachment, *Steele* vs. *Frizzle*, the officer's return of said writ, and his taking the plaintiff as bail for said Frizzle, and of the judgement rendered in said action, and of the writ of execution which issued thereon, and of the *scire facias* prayed out on said judgement by said Steele against the plaintiff, and recovery of said damages and costs.

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The plaintiff introduced several witnesses, whose testimony tended to show that the defendant saw said Frizzle in the life of the execution.—That said Frizzle had personal property known to the defendant, upon which a levy might have been made by him: and further, that the return of the defendant was made after the expiration of the life of the execution, but antedated so as to appear to have been returned within the sixty days.

There was also in this case a plea in abatement to the writ, on the ground that the same was directed "*to the Sheriff of Essex County, his Deputy, or either Constable of Canaan;*" whereas the defendant contended it should have been directed "*to the Sheriff of the County of Essex, his Deputy, or any Constable of the County of Essex,*" agreeably to the statute of 1831.

The County Court overruled this plea: to which the defendant also excepted.

The defendant requested the Court to charge the jury,

1st, That whether the return of the officer, endorsed on the writ, was placed there on the 14th, 15th, or 16th of April, is immaterial in the present cause, and has no tendency to shew the return itself false.

2d, That if the judgement against Cooper, on the *scire facias* was wrongfully obtained, the execution not then having been returned to the justice, it has no tendency to show that the return of the officer was false, and is not therefore to be taken into consideration by the jury.

As to the above request, the Court charged, that the *non est* purports to have been made in the life of the execution; but by the evidence of Mr. Steele, it was in fact made on the 16th or 17th day of April last. If the return had been dated on the day it was actually made, it would appear on the face of it that the execution run out in the hands of the officer, and the bail was discharged. But by anti-dating the return to the 14th of April, in the life of the execution, it *falsely* purports that the execution did not run out in the hands of the officer, but was by him returned in the life of it, or in other words, that the return was made on the execution in the life of it, and the bail was charged. Then, if you believe Mr. Steele's evidence, you will find the return to be false.

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So, if you find that Roswell Frizzle had sufficient personal property liable to be taken in execution, which property came to the knowledge of the defendant, and it was his duty and in his power to have taken it, and did not, then the return is *false*.

So, if the defendant, in the life of the execution, was in company of said Frizzle, and it was the duty and in the power of the defendant to have taken him on the execution, and did not, the said return is *false*.

If you find said return false on either of the said grounds, you will find for the plaintiff all the damages he has sustained by such *false* return. But if you find the return to be true, you will find for the defendant his costs.

The jury returned a verdict for the plaintiff——Whereupon, the defendant excepted to the charge of the Court, and the cause was thereon ordered to the Supreme Court for reconsideration.

Cushman & Bell for defendant.—The writ was directed to the Sheriff of Essex County, or his Deputy, or to either of the Constables of the town of Canaan.—Statute, p. 127, 315, 330. It should, however, been directed to the Sheriff of the County of Essex, his Deputy, or any Constable of the County of Essex.—Acts of 1831, p. 34.

The act of 1797 is repealed by said act of 1831. When the writ is different from the form prescribed by law, it shall abate.—1 Swift. Dig. 610.—Big. Dig. 832.—3 Mass. 193.—11 do. 275.

The charge of the Court, in relation to the antedate of the officer's return, is incorrect.

The returns of *non est inventus* must be legally made in order to charge the bail.—Stat. p. 66.

There is nothing false in the return on the writ.

The officer's endorsement of his doings on the execution *Steele* vs. *Frizzle*, says, in effect, that from the time the officer received the execution, to the 14th of April, he made diligent search throughout his precinct, and could not find either the property or body of said Frizzle.

It no where says that the officer had returned it to the justice on the 14th, within the life of it.

An officer may lawfully return an execution in his hands

after it is out, to endorse his damages on it, and then he of necessity antedates his return.—Big. Dig. 335.—6 Mass. 20.

The fact of the time when an execution is returned to the justice, appears by the records of the justice, and not by the date affixed to the officer's doings on the execution.

In this case, it appears that the officer kept the execution during the whole of it. This was beneficial to the bail, and he was not injured by it.—1 Vt. R. 281.

If the bail did not suffer by the officer's retaining the execution in his hands a few days after it was out, neither justice, policy, or expedience, requires that the officer should be made liable for a false return.—1 Vt. R. p. 282.

If because the execution was not returned to the justice within the life of it, the bail was discharged, then the bail was not injured by the antedate of the officer's return, but was saved from liability by the neglect of the officer to deliver it to the justice, with his return on it, within the sixty days from the date.

How, then, can the officer be liable to the bail?

If liable to any one, it would be to the creditor; as by his neglect, the bail would be discharged.

If the date of the officer's return on the execution is conclusive evidence that the execution was returned to the justice on that day, then the plaintiff should have recovered in the suit—notwithstanding the *scire facias*..

The defendant cannot be made liable, because the justice decided against law on the *scire facias*.—2 Aiken, 72, *Turner* vs. *Lowry*.

Wm. Mattocks, contra.

The opinion of the Court was delivered by

Williams, J.—In this case the plaintiff complains of the defendant, for making a false return on a writ of execution, in favor of James Steel, against one Russel Frizzle, in consequence of which the plaintiff, who was bail for Frizzle, was compelled to pay the amount of the execution.

The first question to which our attention has been called arises on the plea of abatement, on which a judgement of respondeas ouster was rendered, to which judgement

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the defendant excepted. The defect in the writ set forth in the plea, is that it is not directed to any constable in the county, according to the provisions of the statute extending the jurisdiction of constables, passed in 1831.

The judiciary act required that all writs should be directed to the Sheriff of the County, his deputy or either constable of the town where the service was to be made.— The statute of 1831, requires that writs returnable before a Justice of the Peace, shall be directed to the Sheriff, his deputy or any constable of the County, and provides that the first constable of any town, when the town consent, may serve such writs in any town in the County. The direction in the writ, is the precept to the officer, and his authority for making service. If a writ is directed to an officer, who may, and does serve it, it is no cause of abatement that it was not directed to another officer, who might have served it. This writ was directed to the constable of Canaan, who served the same within his precinct, and who was by law authorized to serve the same. This was a sufficient service to hold the defendant to appear. The judgement of the County Court, therefore, overruling the plea, was correct.

The next question is, whether the charge of the Court on the evidence before them was right, or whether they should have been charged as requested by the defendant. The case as presented by the evidence, detailed in the bill of exceptions, shews a great want of moral rectitude in the conduct of the defendant, at least. Whether the facts was so, it were for the jury to determine from the evidence before them. We are only to enquire whether the Court erred in their charge to the jury,

The first question raised, is whether the return, having been made on the execution, after it had run out in the hands of the officer, and after the return day thereof had expired, was false. That a return of *non est inventus* made on an execution, after the return day thereof had expired, with a view to charge the bail taken on *mesne process*, is a false return, we have no manner of doubt; and although it might cause no injury to any one, to antedate such a return when there was no bail taken, or to antedate a return in other cases which might be mentioned; yet, when

there is bail, and when the tendency of such antedating, is to charge them by making the execution appear to have been returned in its life, when it was not, it is not only an injury for which the person who has suffered damage thereby, may recover on an action brought therefor, but it is worthy of consideration, whether it does not amount to something more than a civil injury. Antedating a deed with an intent to defeat a former deed of the same party, and for the purposes of fraud, has been adjudged to be a forgery. There is no doubt that the charge of the Court was right, when they told the jury that if the return was made after the execution had expired and was antedated, it was a false return.

There is as little doubt that the views of the County Court was equally correct, in not acceding to the second request of the defendants counsel. Indeed, I was not a little surprised at the argument which was here insisted on, that if the return was false, the plaintiff sustained no injury, because he might have successfully defended the *scire facias* which has been brought against him, that the justice who rendered judgement against the present plaintiff, was the one who had caused the injury. The counsel for the defendant have urged, apparently with some degree of confidence, that the action is brought here because the person who instituted the suit against the plaintiff as bail for Frizzle, persuaded the justice to render a wrong judgement.

It is true, that the plaintiff has sustained an injury by this judgement, and that if the same facts which were disclosed on this trial, had been made to appear before the justice who gave judgement on the *scire facias*, no such judgement ought to have been given. It is also true, that no such judgement would have been given, nor any suit commenced against this plaintiff, if it had not have been for the false return made by the defendant.

It has been determined by this Court in the case of *Turner* vs. *Lowry*, 2d, Aiken 72; that to charge bail, the officer who has a writ of execution for service, must return the same into the office from which it issued, with a regular return of *non est inventus*, within the life of the execution. Although it may be true, that the plaintiff, Cooper,

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was discharged as bail for Frizzle, by the neglect of the defendant to return the execution within the life of it; and might, if he had knowledge of the fact, have successfully resisted a recovery against himself on the *scire facias*. Yet, as the defendant under color of a return made officially by him, endeavored to conceal this fact from the plaintiff, and made the execution appear to have been returned in the life of it, when in fact it was not returned until some days after, he thereby occasioned the injury of which the plaintiff complains, and it is not for him to say, that if the plaintiff had sooner discovered and proved the misfeasance of which he was guilty, the injury would have been less. We are entirely satisfied with the charge of the Court and the verdict of the jury.

The judgement of the County Court is therefore affirmed.

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ISAAC FARNHAM *vs.* OLIVER INGHAM and ELIJAH FRIZZLE.

Parol evidence is not admissible to show that a note, purporting to be absolute, was to be payable only on condition.

A subsequent agreement by parol that a note may be *paid* in a different way than is expressed in the note, if the agreement is performed, may be given in evidence in an action on the note.

Such agreement, made at the time the note was executed, is admissible in evidence.

This was an action originally commenced in the County Court, on note, dated May 17th, 1825, for $120, payable by the 1st of September, then next—half in neat stock, and half in cash, with interest. Plea, *General Issue*, closed to the jury.

The signature of the note was admitted by the defendants.

The defendants offered *parol evidence* to prove that the note in question was executed for the balance found due on a judgement rendered in New-Hampshire, on which a suit was then pending in Essex County Court, in favor of one Silas Curtis, against said Oliver Ingham, and which had then been submitted by said Farnham, as agent of said Curtis, and by said Ingham to the arbitrament of one Moses Martin, who awarded said sum of $120 as the balance

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due on said judgement, and that said note was executed in consideration of said award, and of a discharge of said judgement and suit thereon, then executed by said Farnham, as agent of said Curtis, to said Ingham; also like evidence to show that said note was a conditional note to be void, if said Farnham did not immediately, or at the term then next of said County Court, in 1825, cause said Curtis' suit to be discontinued and stricken from the docket, without cost to either party: also like evidence to prove, that at the time of settling said Curtis' suit, and executing said note, and as part consideration of said settlement, the plaintiff agreed with, and promised the said Ingham, that he would cause said Curtis' suit to be discontinued as aforesaid, and in case of failure so to do, would allow on the said note all actual cost, trouble, counsel and attorney fees and expenses, which said Ingham should be put to, or spend in defending said Curtis' suit, on the ground of said discharge. And that owing to said Farnham's interposing his deposition in said Curtis' suit, testifying in substance that he, said Farnham, was not authorized by said Curtis to settle and discharge said Curtis' suit, and to other causes, said Ingham was obliged to expend, and did expend large sums of money in paying counsel, attorney's fees, and other large sums over and above his legal costs, in said Curtis' suit, in defending the same on the ground of said discharge, to wit, more than the amount of said note; and that said Curtis' suit was kept in Court nine terms after said discharge, and was not finally disposed of until the July Term of the Supreme Court, A. D. 1829, when the said Ingham recovered a final judgement in said Curtis' suit for his legal costs, taxed at $93.12, which has been collected.

To all which evidence the plaintiff objects, and insists that parol evidence is not to be permitted to add to, contradict, explain, or vary the note in question.

The Court overruled the objection, and permitted the defendants to go into a showing of their statement of facts: Whereupon, the defendants gave in evidence to the jury the deposition of Moses Martin, including said discharge: also sundry witnesses testified, all tending to prove the de-

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fendants' statement of facts, as aforesaid: also gave in evidence the plaintiff's deposition, tending to show that he was not agent of the said Curtis when he executed said discharge, which deposition was used to defeat said discharge and said Curtis' suit: also evidence showing the expenses in defending said Curtis' suit.

Whereupon, the Court charged the jury *that the defendants might give in evidence that the note was given on condition to be void, if said Farnham did not cause said Curtis' suit to be discontinued and stricken from the docket, as contended for by the defendants. And if the jury found the note was given on such condition, which had not been complied with by the plaintiff, they might find for the defendants their costs.* But if the jury do not find that the note was given on such condition, but was given in part consideration that the plaintiff would cause said Curtis' suit to be discontinued forthwith; and in case of failure, would allow on said note all the actual costs, trouble and expenses the said Ingham was subsequently at in defending said Curtis' suit: and also find that the plaintiff never caused the said Curtis' suit to be discontinued; and by this neglect, the said Ingham was put to great trouble, costs and expenses the jury, in finding damages for the plaintiff, may deduct the amount of such costs, trouble and expenses, from the amount of said note, in mitigation of damages. But under the present state of the pleadings, it was the duty of the jury to find a balance for the plaintiff, though such balance may be only nominal damages; unless the jury find the note is void, as the defendants contend, in which case the jury will find for the defendants their costs.

The jury returned a verdict for the defendants their costs.

The plaintiff excepted to the charge of the Court.—Exceptions being allowed, the cause comes here for revision.

Fletcher, for plaintiff.—The plaintiff contends, that if any portion of the testimony ought not to have been admitted, or either branch of the charge be erroneous, the Court will order a new trial.

There was no want of consideration; for the amount of

the award was for a full and adequate consideration, being precisely for the amount of the note. There was no failure of consideration; for the discharge was plead and became a bar, and operative in that action. There was no illegality of consideration; for the submission was lawful, the award legal, and Ingham's note, with surety, a full satisfaction of the award.

But the defendants contend, that the note was executed as well upon the consideration that the Curtis suit should be discontinued as for the award, and that the Curtis suit was not discontinued. This, at most, would be but a partial failure of consideration; and partial failure is no defence, unless it be for a sum certain, and then only for *pro tanto*. But where the sum remains in estimation, evidence is inadmissible; for the defendant has a distinct and independent remedy.—*Maggridge* vs. *Jones*, 14 East. 486.—*Morgan* vs. *Richardson*, 1 Camp. 40.—*Fye* vs. *Guynne*, 2 Camp. 347.

Parol testimony can in no case be admitted to alter the legal effect of a written simple contract.—*Rawson* vs. *Walker*, 2 Com. L. 427.—*Free* vs. *Hawkins*, 4 Com. L. 32.—*Campbell* vs. *Hodgson*, 5 Com. L. 468.—*Stackpole* vs. *Arnold*, 11 Mass. 27, 32, &c.—*Saunders'* P. & Ev. 2 Vol. 242.—*Rose* vs. *Leonard*, 15 Mass. 154–5.—*Brigham* vs. *Rogers*, 17 Mass. 574.

1st, The note is absolute upon the face of it. It was delivered to plaintiff in satisfaction of the award, as in consideration of the agreement to discontinue the Curtis suit, a right became vested thereby, and parol evidence cannot be received to defeat such right.

2d, The testimony received to reduce the damages, was wholly incompetent, and should have been rejected altogether. It lay entirely without the issue. It could not be received in payment, nor did it tend to shew that the plaintiff had no cause of action at the time of commencing the suit. It rested wholly in contract, upon which no issue was formed. This judgement could not be plead in bar to an action upon that contract, nor would the record furnish any evidence that the rights of the parties had been adjudicated. The only legal way in which this contract could avail the defendants, would be by a plea of set-off, which has

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already been attempted, in this suit, and the rights of the parties settled. To receive such testimony, would be to surprize the plaintiff—to perplex and mislead the jury.

3d, The charge of the Court is erroneous. To have warranted the first branch of the charge of the Court, the evidence must have tended to have proved a want of consideration, or a total failure of consideration. The satisfaction of the award remained good, though the discontinuance had not been entered, nor the discharge plead. At most, it was but a partial failure, and had it not lain in estimation of damages, the note would only have been void *pro tanto*, and the charge is repugnant to the whole tenor of the authorities above cited. The second branch of the charge is equally erroneous. It is only where the contract remains open that the defendant can be let into an equitable defence to reduce the damages—not where there is an independent, subsisting agreement existing, entered into at the time of making the contract declared upon.—Saund. Plead. and Ev. p. 188.—*Sanders* vs. *How*, Chip. 363.

Wm. Mattocks, contra.

The opinion of the Court was pronounced by

Williams, J.—There appears to be two grounds of defence set up by the defendants, which are inconsistent with each other. They contend that the plaintiff agreed at the time the note was executed that if he failed to discontinue a certain suit, the note should be void, and also if he failed to discontinue the suit he would allow on said note all actual cost, trouble and expense which the defendant Ingham should be subject to in defending said suit.

Evidence to prove these agreements were offered and objected to, and admitted by the Court. The jury were charged to take the same into consideration and must under the charge have found the agreement first mentioned, as their verdict was for the defendant.

First question is—was the evidence admissible to show the agreement, that the note should be void on certain conditions.

The general principle is that when parties make a contract in writing, that writing is supposed to contain the

whole contract, and no evidence is to be received to contradict, alter or explain it, or to show any thing inconsistent with the writing. This principle is too clear to be questioned, and it remains to enquire whether the Court in admitting the evidence offered, contravened this principle of law.

The note appears to have been absolute on the face of it, for the payment of money and stock, by a certain day, purports to be, and was proved to be, for a valuable consideration, and was in contemplation of law a note for the payment of money and stock, absolutely by the time therein limited. Now, although evidence was admissible to impeach the consideration, or to show no consideration, yet it was not admissible to vary the promise. The evidence which was admitted went directly to contradict this note or writing, to make it payable on a contingency only, and not absolutely, as it purported; and in this view, it directly contravened the case of *Hoare et al* vs. *Graham et al*, 3 Camp. 57; *Free et al* vs. *Hawkins*, 8 Taun. 92; *Woodbridge* vs. *Spencer & wife*, 3 Barn & Ald. 233; *Mosley, assignee of Robins* vs. *Hanford*, 10 Barn. & Cres. 729.

As the evidence was improperly received and the charge of the Court upon it incorrect, we are all of opinion that judgement of the County Court must be reversed and a new trial granted.

On the other part of the case, we are not so well agreed. It appears that the evidence was also received on the second branch of the defece in payment of the note.

It strikes me that this evidence ought also to have been rejected as militating against the same principle of law, to wit, that nothing can be added to a written agreement. It has been decided, that if there is a clear *subsequent* independent agreement for the discharge of a contract or varying the terms, or enlarging the time of the performance, it may be received in evidence; but I apprehend that such an agreement made at the time when the contract was reduced to writing, cannot be received, as it would vary the terms of the contract; the written contract is supposed to be the best evidence of the whole contract. *Rich* vs. *Jackson*, 4 Br. C. C. 514; *Portmore* vs. *Morris*, 2 Br. C. C.

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219. My brethren however, (Royce & Baylies) think that there was evidence of a collateral agreement for the payment of the note in a particular way, and as such, not liable to the objection arising from the general principle, and in this view it was admissible under the general issue to show the agreement, that the costs should be applied in payment of the note, if Ingham was subject to costs by the failure of Farnham to discontinue the suit. The judgement however, is reversed and a new trial granted, for the reason stated above.

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Thomas Holbrook, Administrator of Isaac Morgan vs. Zebina Blodget.

When one of the heirs of an estate appears before the Court of Probate on his own account solely, to oppose the allowance of an administrator's account, and the administrator in consideration of his withdrawing his objection to the account, executed a discharge of a debt which as administrator he held against him, such discharge is executed upon a valuable consideration, and will discharge any action brought to recover the debt.

A receipt in full, executed by a person on the supposition that his claim amounted to a certain sum only, when he had the means of ascertaining the amount, and was informed that the discharge must be a discharge of his whole demand without regard to the sum, will be considered as a discharge of his whole demand, notwithstanding it may amount to a greater sum than was supposed.

This was an action of *Assumpsit* brought on two promissory notes, purporting to be executed by the defendant, to said intestate, on the 24th day of July 1819, one for $20, and the other for $132, &c.

Plea of payment of $500, to the plaintiff, as administrator, on the 12th July 1832, in full satisfaction of said notes. To support this plea which was traversed, and issue joined to the country, the defendant gave in evidence a receipt in writing of that date, whereby the plaintiff under his own hand, as administrator acknowledged the receipt of $500, of the defendant, in full of all demands, in favor of said estate against the defendant. The plaintiff also gave in evidence another receipt, executed to him as administrator by the defendant, of the same date wherein the defendant acknowledges the receipt of a certain

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sum of money of the plaintiff, as administrator, in full, for a certain judgement, which the defendant held in his favor against said estate. The plaintiff also insisted that his receipt to the defendant was obtained by a fraud or mistake, which should avoid the receipt or limit its extent. To prove this *fraud* or *mistake*, the plaintiff introduced Rich Stevens, who testified, that on the 12th July, 1832, he went with the plaintiff to Lunenburgh to appear before the Probate Court, and assist the plaintiff to have his administration account allowed, which was then pending before said Court, for allowance, and there saw the defendant, who appeared with General Seth Cushman, as his counsel, to resist the allowance of said account. Cushman said the plaintiff's account was large, and would be cut down, if any body objected to the allowance; and said if the plaintiff would give up the notes against the defendant, the defendant would not appear before said Court and object to the plaintiff's administration account, that he asked Cushman how much he supposed was due on the notes? and he answered that he thought there were $26 or $27 due, butsaid he would go and see; and after being absent a while returned, and said the sum due was some over $28, but he *would vouch* or *guarantee* it was not over $30. The plaintiff and defendant then went out of doors and the witness set down to the table to look over the papers and ascertain the balance due to the plaintiff. Before the witness got through with his cast, the defendant came into the house and requested a pen and ink, which he took and carried out of doors. Soon after the witness saw the receipt, which was signed by the plaintiff. The defendant did not, afterwards appear to oppose the allowance of the plaintiff's administration account. Witness further testified, there were eight *heirs* to the estate, and the defendant was one of them, and bought out two others. According to his, the witnes's cast, there were $33 or $34 balance, due from the defendant to said estate.

Defendant called General Seth Cushman, who testified that on the 12th July 1832, he went to Lunenburgh for the defendant to oppose the plaintiffs' administration account before the probate Court, and had conversation with *Stevens;* then with the plaintiff, and told them that if the

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plaintiff would pass mutual receipts in full of all demands with the defendant, the defendant would not appear before the Court to oppose the plaintiff's administration aforesaid; and if such receipts were not executed, the defendant would oppose the allowance of said account.—Something was said by witness, as to the amount of the balance due to the defendant, as administrator, but what, the witness has not a distinct recollection, but is sure he never said he would *vouch* or *guarantee* it was not over $30. The defendant instructed the witness, as counsel, that if mutual receipts were executed, it must be done without reference or regard to the amount of balance due from the defendant to the plaintiff as administrator. For the defendant was determined to have a full settlement with the plaintiff, or none. On this ground the amount of balance became immaterial, though witness shortly before the receipt was given informed the plaintiff of his, witness' instructions, as above stated; and on this ground the receipts were executed.

Judge Gates, testified that he heard General Cushman tell the plaintiff, just before the receipts were signed, that they must be executed without any regard to the amount of the balance that was due from the defendant to said estate. Cushman told the plaintiff he did not know how much the balance was; and witness thinks both of said receipts were signed at the table.

M. Haywood, testified that the reeeipts were signed at the table. There was no evidence that the defendant was employed by any of the heirs to said estate to oppose the allowance of said administration account, or that any of the heirs were dissatisfied with said account except the defendant.

The evidence being closed, the counsel for the plaintiff requested the Court to charge the jury,

1st. That if they found that the only consideration for the receipt relied upon by the defendant was the agreeing to withdraw his objection to the allowance of the administration accounts, that said receipt was void and inoperative in law, for want of a legal consideration.

2. That if the jury found that Cushman for the defendant did tell the plaintiff that the settlement was to be made

without regard to the amount of the balance between said allowances, yet, if Cushman in behalf of the defendant did request the plaintiff to remain while he went to the Judge of Probate's room; and if said Cushman returned and said that the same was not over thirty dollars, and that he would *vouch* or *guarantee*, that the sum was not over thirty dollars, then in law, said receipt would operate as a discharge for, only thirty dollars, and the plaintiff would be entitled to recover the difference between thirty, and the amount of the balance of the aforesaid allowance.

3d. The Court is requested to charge the jury that if the receipt relied on by the defendant was given upon no other consideration than an agreement by the defendant, not to oppose the plaintiff's administration account, then pending before the Judge of Probate for allowance, that the receipt is void or inoperative in law, and the plaintiff entitled to a verdict for any thing stated in said receipt.

The Court charged, that on the 12th July 1832, the plaintiff and defendant passed mutual discharges, the plaintiff by his receipt says, he received $500, in full for all demands, he, as administrator on the *estate* of Isaac Morgan, deceased, had on the defendant. And the defendant gave his receipt to the plaintiff for $500, in full for a certain judgement in his favor against said estate. Now the plaintiff sues the defendant on two notes which the defendant gave the intestate; the defendant pleads payment. The plaintiff says this receipt was obtained by *fraud* or mistake. If the receipt was obtained on either of these grounds, it is not good; but to avoid the receipt for fraud, the fraud must be proved. Has the plaintiff satisfactorially proved that this receipt was obtained by fraud or mistake? If he has, then you will lay the receipt out of the case, and find for the plaintiff the same he claims, $54; but if he has not, then you will find for the defendant his costs.

The plaintiff excepted to the charge, and the omission of the Court to charge as requested; which exceptions were allowed, and the cause passed to the Supreme Court for further adjudication.

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J. Mattocks, for plaintiff.—1st, The agreement to withdraw the objection to the administration account, was the only consideration of the discharge; and this was an illegal consideration. Therefore the the right of discharge not being under seal, is invalid for want of consideration. This consideration was against the policy of the law.—Esp. N. P. 92. *Nerot* vs. *Wallace et al.* 3 T. R. 17. This was also *contra bonos mores.* The parties were both performing a trust. The administrator was acting for creditors and heirs, and defendant for heirs; & they were both colluding to pervert justice by stifling an examination before the Judge of Probate. It is said the defendant was only acting for himself, in objecting to the allowance of the account. A defence of one heir would operate as a defence for all; and none others appearing, the Court will presume he appeared for all. The case shews that the others would not have consented to the bargain, and the bargain shews that it was the debt of defendant alone that was given to buy him off, or that the other heir knowing he attended, therefore omitted to defend. The agreement not to defend, was not a valuable consideration.—It might be no damage to defendant, nor benefit to plaintiff, as others might defend or appeal. The contract was only that defendant would not defend. It is like the grant of an estate at will, which may be put an end to in an hour; and therefore, says the law, is a trifling consideration, and not valid.

2d, The Court wholly omitted to charge the jury that if they found the facts relating to the amount of the debt against defendant, and the statement and assurance of Gen. Cushman, counsel for defendant, as plaintiff contended; they were proved, that the procuring the discharge under those circumstances was fraudulent in law as to all above the sum of $30, and that therefore the discharge or payment should operate only a payment of $30, and plaintiff be entitled to recover the balance. The Court only charged generally, that if they found the discharge fraudulently obtained, it was void; but wholly omitted to instruct them as requested by plaintiff's counsel, what would be in law fraud as related to the facts which the plaintiff's testimony tended to prove.

Cushman, for defendant.—There was a sufficient consideration for the receipt.

1st. The receipt of $500 was executed by defendant to plaintiff in discharge of a judgement.

2d. Omitting to appear and defend against the account of plaintiff, as administrator of said estate, was a consideration.—1 Swift. Dig. 189–90.—Big. Dig. 150, and authorities there cited.

There was no fraud or mistake.

The amount of defendant's indebtedness to the estate, was a fact as well known, and within the power of the plaintiff to know, as within the means of the defendant's knowledge; and if plaintiff did not ascertain it, it was his negligence.—2 Stark. Ev. 470.

An agent must act within his instructions, or the principal is not bound.—2 Stark. Ev. 60.—1 Swift. Dig. 328–9.

Principal is not bound by misrepresentations of the agent.—7 John. R. 391, *Gibson* vs. *Coit & others*.

If a promise be made on two considerations, and one is valid and the other not, the promise is binding.—Big. Dig. 152.—8 Mass. 46.

The opinion of the Court was delivered by

Williams, J.—The question to be decided in this case arises from the omission of the Court to charge the jury as requested by the plaintiff. If the plaintiff was entitled to the charge requested, then the judgement must be reversed, as the Court omitted to state the law as claimed by the plaintiff. The first and third request appear to be nearly the same, and are founded on the idea that the agreement of the defendant not to oppose the allowance of the plaintiff's account, as administrator would not be a legal consideration for the discharge executed by the plaintiff.

It appears that the plaintiff, as administrator to the estate of Morgan, has presented to the Court of Probate his administration account for allowance. The defendant, as one of the heirs, appeared to oppose the allowance of the account. This the defendant might do for his own benefit alone; and if he did, it then became a controversy between him and the administrator. It does not appear from any

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part of the testimony, that he was agent for any of the other heirs.—Nor is the request to the Court predicated upon any such supposition. The defendant, therefore, by agreeing to withdraw his objections to the allowance of the account, was in no way instrumental in assisting the administrator to defraud the other heirs. The Judge of Probate was to allow the account, and to see that it was correct.—The other heirs were undoubtedly notified, and might have made the same objection as the defendant. If they did not choose to be at the expense of contesting the administrator's account, and the defendant did think proper so to do, the controversy was wholly between this plaintiff and this defendant. A settlement of this controversy, to avoid further litigation, may have been, & was undoubtedly thought by both to be, advantageous to both.

This was a legal consideration for a contract, and also for the discharge which the plaintiff then executed. The plaintiff was not therefore entitled to the charge which he asked on his first and third request, to wit, that the jury should be told that the discharge executed under such circumstances was inoperative and void.

The second request is founded upon the supposition that there was no fraud intended or practised, but that the discharge was executed on the suggestion of Mr. Cushman, that not more than thirty dollars were due to the plaintiff, when there was a greater sum; and the plaintiff therefore claimed that it should be good only for that sum, although the plaintiff was told that the settlement was to be made without any regard to the amount due. But if the plaintiff did set his name to the discharge understandingly, and being informed that it must be a discharge of the whole sum due on the judgement, he must abide by the legal effects of that instrument which he then executed, more especially as the means of ascertaining the balance was equally within the power of either of the parties, and depended only on a computation. He must, or might have known the amount of his own claim, and if he chose to rely on the statement of Mr. Cushman, he cannot now complain. This is wholly different from the case supposed in the argument, when a person intends to take a note for the amount of a judgement, and on application to the Clerk for a statement

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of the judgement, he gives them a wrong sum: In that case, the note is intended to be given for the amount as ascertained. In this case, the parties intended to discharge the whole claim, more or les—making what is vulgarly called *a jumping settlement.* The statement of Mr. Cushman was only a part of the conversation preparatory to the final adjustment. The plaintiff therefore was not entitled to the charge asked for in this request.

The Court was not requested to point out particularly what fraud would operate to avoid a discharge; but those facts which the plaintiff claimed to have considered as conclusive evidence of fraud in the first and third request, we do not think constituted any fraud whatever. The discharge, therefore, which was executed by the plaintiff, was a bar to his claim.

The judgement of the County Court is therefore affirmed.

William Fuller Jr. vs. Sears & Clement.

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Where the plaintiff is not permitted to prove, that the defendants' action, other than the one on trial, had no merits.

A fraud in fact may exist in the sale of goods, although the purchaser pays full value, and receives possession.

A sale of goods *bona fide*, and at the same time *a fraud in law*, explained.

Fraud *in fact*, and fraud *in law* are often interwoven; and when it is so, if the plaintiff prove *fraud in law*, it may be sufficient to entitle him to recover, without showing fraud *in fact*.

Fraud *in law* means, that the sale is *inoperative*, and *void* as to the creditors of the vendor.

This was an action of trespass, for taking and driving away a yoke of oxen, claimed by the plaintiff. Defendants plead the General Issue, and gave notice that the oxen were taken on legal process as the property of John Fuller. Issue joined to the country, and tried June Term, 1832. The plaintiff gave evidence tending to show that his brother John Fuller, in the Spring of 1831, hired a farm of his father, William Fuller, for a year, then next; and bought the oxen in question, of Roger Enos, and gave his note to said Enos, to pay him $75,50, for said oxen; that said John Fuller kept said oxen with his other cattle

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on said farm as long as he occupied. That said John raised upon the farm that season eight or ten tons of hay; forty bushels of wheat and corn, and two hundred bushels of potatoes. (Plaintiff cut some hay on said farm upon shares as agreed between him and John) After securing the crops, the said John concluded he would quit the farm, and in the fall of that year sold said oxen, and crops to the plaintiff, and in part pay for the same, the plaintiff let the said John have a mare at the price of sixty dollars, and thirty dollars in cash; and thereupon the said John gave the plaintiff sole, and exclusive possession of said farm, oxen, and crops, and went a journey. The defendants immediately after, finding said oxen on said farm, attached the same, as the property of the said John.

The defendants gave evidence tending to prove, that after said oxen were attached, they went back into the hands of said Enos, who accounted and paid the plaintiff for said oxen the sum that said John agreed to give for said oxen; and said Enos now owns said oxen. The defendants also gave in evidence the writs of attachment described in their notice. The plaintiff then offered to prove, that said Clement had no merits in his said action, which he commenced against said John. This evidence was objected to, and the Court excluded the same.

The Court charged the jury to consider whether the sale of the oxen from John Fuller to the plaintiff, was fraudulent in fact,or law. If the jury found that John Fuller wished to leave the State to avoid, or delay his creditors, and the plaintiff knew it, and purchased all his personal property at prices agreed on, and let him have a horse and thirty dollars in cash to enable him to abscond, it was a fraud *in fact*, and as it respected John's *creditors* the sale was void, and the oxen, hay, grain, and potatoes were liable to be taken for John's *debts*.

So if the jury found the sale of the oxen was *bona fide*, and the possession did not follow the sale, it was a fraud in law, and the *creditors* of John might attach the oxen as his.

If the sale of the oxen was fraudulent in fact, or in law, it was the duty of the jury to find for the defeodants. Or, at any rate, the jury could find only nominal damages for

the plaintiff, if they found that the plaintiff had sold and received his pay for the oxen, as testified by Enos.

Also at the request of the plaintiff, the Court charged, that if the jury found, that the plaintiff was in open possession of the farm, when he bought the oxen, and they were attached; the oxen remaining on the farm must be considered in the possession of the plaintiff, and it was not a fraud in law.

The jury returned a verdict for the defendants to recover their costs. Plaintiff excepts, &c. which exceptions were duly allowed by the County Court.

The opinion of the Court was pronounced by

BAYLIES, J.—The first enquiry is, was it admissible for the plaintiff to prove, "that the said Clement had *no merits* in his said action, which he commenced against the said John." It would have been a novelty to have tried the *merits* of that action in this suit. It cannot be supposed, that the defendants came to Court with an expectation to go into a trial of that action to ascertain, whether it had *merits*, or not. The law required no such thing. It was sufficient, if said Clement was a creditor of said John, *prima facie*, without his showing the amount that was due. The County Court in their charge, told the jury, "if they found that John Fuller wished to leave the State to avoid, or delay his creditors, and the plaintiff *knew* it, and purchased all his personal property at prices agreed on, and let him have a horse, and thirty dollars in cash to enable him to abscond, it was a fraud *in fact*, and as it respected John's creditors, the sale was void, and the oxen, hay, grain, and potatoes were liable to be taken for John's debts." A transaction like this, is clearly within the letter, and spirit of our act, Chap. 32, sec. 7, which says, "That all fraudulent, and deceitful conveyances of goods or chattles, and all bonds, bills, notes, contracts, and agreements, and all suits, judgements and executions, made or had, to avoid any right, debt, or duty of others, shall, as against the party or parties, only, whose right, debt, or duty is endeavoured to be avoided, their heirs, executors, administrators, or assigns, be utterly null and void, and any false pretence, or feigned consideration to the contra-

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ry notwithstanding." This act has the substance of 13 Eliz. c. 5, which says "that no act whatever, done to defraud a creditor or creditors, shall be of any effect against such creditors." On this clause of the Statute, in the case of *Codogan* vs. *Kennett*, Cowper, 434, Lord Mansfield says, "If the transactions be not *bona fide*, the circumstance of its being done for a *valuable consideration*, will not alone take it out of the statute. I have known several cases, where persons have given a fair and full price for goods, and where the *possession* was *actually changed;* yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void."

"One case was where there had been a decree in the Court of Chancery, and a sequestration. A person with knowledge of the decree, bought the house, and goods belonging to the defendant, and gave a full price for them. The Court said, the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, was void." "So if a man knows of a judgement, and execution, and, with a view to defeat it, purchases the debtor's goods, it is void, because the *purpose* is *iniquitous*. It is assisting one man to cheat another, which the law will never allow." These observations upon the 13 Eliz. c. 5, justify the County Court in their remarks, upon what would be a *fraud in fact*, within our statute. So this part of the charge derives support from the case of *Edgell* vs. *Lowell & Bennett*, 4 Vt. Rep. 405.

The Court also charged the jury, "if they found the sale of the oxen was *bona fide*, and the possession did not follow the sale, it was a *fraud in law*, and the creditors of John might attach the oxen as his."

It may not be easy to understand, how the sale could be *bona fide*, and at the same time a *fraud in law*. But I suppose the meaning of the County Court was, that if the vendor at the time of sale, had no intention to defraud his creditors, and sold his oxen at a fair price, and received his pay—also, if the vendee did not intend to injure any body by making the purchase, and paying his money for the oxen; then both vendor and vendee had good inten-

tions, and acted *bona fide* in entering into the contract.— But as the oxen did not accompany, and follow the sale, it rendered the contract *inoperative* and *void*, as to the creditors of the vendor; or in other words, created that state of things, which is denominated a *fraud in law*. It *seems* to be settled in this State, that an absolute unconditional sale of goods, under circumstances admitting of immediate delivery of possession, if the possession does not accompany, and follow the sale, the conveyance is fraudulent *per se*, and void as to creditors: leaving the possession of the goods in the hands of the vendor, operates as a deceit, and fraud upon his creditors, and vitiates the sale. *Mott* vs. *McNiel*, 1 Aik. 162; *Weeks* vs. *Wead*, 2 Aik. 64. The same principles are recognized as law by the Court of K. B. England, in the case of *Edwards* vs. *Harbin Ex.* 2 T. R. 587. Also by the Supreme Court of the United States, in the case of *Hamilton* vs. *Russel*, 1 Cranch, 309.

Fraud *in fact*, and fraud *in law*, are often interwoven with each other: When this is the case, it is not necessary to enquire after the *fraudulent intent* of the parties to the contract; but simply, whether the goods remained in the possession of the vendor after sale. This fact is easily proved, while the *fraudulent intent* is dexterously concealed. If the vendor remained in possession of the goods after sale, and no good reason can be assigned why it was so; this of itself is sufficient to render the sale inoperative, and void as to creditors. The charge says "if the sale of the oxen was fraudulent *in fact*, or *in law*, it was the duty of the jury to find for the defendants." This cannot be disputed. So the charge says, "At any rate the jury would find only nominal damages for the plaintiff, if they found that the plaintiff had sold, and received his pay for the oxen as testified by Enos." This part of the charge could have no influence upon the minds of the jury, in as much as they had no occasion to assess the damages, but found for the defendants their costs.

Judgement is affirmed.

Story, for plaintiff.
Cooper, for defendant.

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HEMAN GIFFORD vs. DAVID FORD.

The jury may find that a party signed an instrument not witnessed, by comparing the hand-writing to such instrument with the hand-writing to another instrument, which the party admits he signed.

Where A. was owing B. $23, executed a bill of sale, absolute on the face of it, to B., of A's household goods; and at the same time A. rebeived back the goods, and gave his receipt for them to B., therein promising to return said goods to B. any time after one year on demand: And then and there a parol agreement was made between A. and B. that the bill of sale should be void, and the title of the goods should revest in A. if he paid B. the $23 in one year.—Held, this was a mortgage of A's goods to B. to secure the payment of $23 in one year, and if the money was not paid, B's title to the goods became absolute.

The difference between a mortgage and pawn of goods considered.

A conditional, as well as an absolute sale of goods, may be fraudulent as to creditors.

The defendant cannot set up fraud, as to his creditors, to avoid the contract.

The contract being a mortgage, the Court did right in not charging the jury, that it was no more than a simple pledge, or pawn.

Trover will lie for the goods.

This was an action of *trover and conversion* for certain household goods. Plea, *not guilty*. Issue joined to the country.

On trial, the plaintiff offered, and gave in evidence, a certain receipt in writing, of the following tenor:

"Received of Heman Gifford the following articles, viz: Six black ornamented dining chairs; one three and a half feet cherry table, one gilt framed looking glass of a small size; one cherry light stand, with a drawer in it; one good feather bed, pillows, coverlet, with the bed-tick belonging to the same: all which property I promise to safely keep, and return to said Gifford or his order, any time when demanded, after the 10th day of April next.

"(Signed) DAVID FORD.

"Sharon, April 10th, 1828."

The defendant acknowledged in Court he signed said receipt.

The plaintiff also offered in evidence an absolute bill of sale of said household goods, with a price annexed to each article, all amounting to $32, dated at Sharon, April 10th, 1828, and closed in these words: "Received payment in full. David Ford."

The defendant objected to the said bill of sale going to the jury as evidence, until the hand-writing of the defend-

ant was proved. As the hand-writing to the receipt was acknowledged by the defendant to be his, the Court admitted the bill of sale to go to the jury for them to find the hand-writing thereto, by comparing it with the hand-writing to the receipt.

The plaintiff also gave in evidence the deposition *Geo. Parkhurst, Jr.*, which, among other things, tended to prove, that before the commencement of this action, he being authorized by the plaintiff to demand of the defendant the goods described in said receipt, did demand the same of the defendant at Burlington, 11th September, 1829, and he refused to deliver them up: whereupon this action was brought.

The defendant then gave in evidence another deposition of the said *Parkhurst*, which tended to show, that said *Parkhurst* saw the defendant sign said bill of sale.—Said depositions also tended to show, that at the time the defendant executed said bill of sale and receipt to the plaintiff, it was ascertained by the parties, that the defendant was owing plaintiff twenty-two or twenty-three dollars, and it was agreed between them, that if the defendant paid the plaintiff that sum by the 10th of April, 1829, the goods should be the defendant's; and if he did not pay that sum by that time, the goods should be the plaintiff's absolutely.

The defendant contended, and requested the Court to charge,

1st, That if the jury should find that the defendant had the possession of the goods by contract, the plaintiff could not maintain trover for them.

2d, That if they should find that the defendant was owner of the goods, and had made them over to the plaintiff as collateral security, for the payment of the sum already due, it would constitute no more than a pledge.

3d, That if the goods were pledged to the plaintiff, and he suffered them to remain in defendant's hands, or go immediately back into his possession, the aforesaid property created by the bailment was determined, and gone.

4th, That in case of a pledge of personal property, the general property remains in the pawnee, and only the special property passes to the pawner.

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5th, That all the circumstances attending the transfer by bill of sale, and receipt, are to be considered as part, and parcel of the transaction.

6th, That this transaction cannot be regarded as a mortgage of personal property; but at most merely as a pledge.

7th, That a recovery in this action would be no bar to a recovery on the note for $23 held by the plaintiff against the defendant, & for which the same property was pledged.

8th, That to entitle the plaintiff to recover, the jury must find, that the *demand* was not only *legally* made, when made, but also that it was made at *Sharon*, where the bill of sale and receipt were executed.

9th, That the special owner of goods cannot maintain trover against the general owner.

10th, That if they find that the defendant has violated his contract with the plaintiff, the proper remedy of the latter is not trover; but an action for the breach of the contract.

But the Court, instead of charging in all respects as required, charged the jury as follows:

If the jury find, that the goods and chattels, described in the plaintiff's declaration, were mortgaged by the defendant to the plaintiff, to secure the payment of a balance of twenty-two or twenty-three dollars to the plaintiff from the defendant, and said goods and chattels were to become the plaintiff's *absolutely*, if said balance was not paid to the plaintiff by the 10th of April, 1829; and also find that said balance was not paid the plaintiff by the 10th of April, 1829, then said goods and chattels on that day become *absolutely* the plaintiff's, and he was entitled to the possession of them on demand.

It is in evidence that the goods and chattels were demanded of the defendant by Mr. Parkhourst, on the 11th of September, 1829. Parkhurst held, and presented defendant's receipt for the goods and chattels at the time he demanded the same. This holding the receipt was *prima facie* evidence that he was agent of the plaintiff to make the demand, and take possession of the goods and chattels. Moreover, Parkhurst testifies that he was such agent. As the defendant did not deliver up the goods and chattels to the said Parkhurst when demanded by him as aforesaid,

the plaintiff can sustain an action of trover for said goods and chattels. The rule of damages is the value of the goods and chattels converted by the defendant. But in this case, if the jury find that the value is more than the balance, which was the plaintiff's due, the jury may find damages to the amount of said balance, and interest thereon, in as much as the plaintiff consents to this rule.

The jury returned a verdict to the amount of said balance and interest, which verdict the Court accepted, and rendered judgement thereon. The defendant excepts, &c.

The opinion of the Court was pronounced by

Baylies, J.—The hand-writing to the receipt was admitted by the defendant to be his, and the County Court suffered the bill of sale to go to the jury for them to find the hand-writing thereto, by comparing it with the hand-writing to the receipt. As this Court have decided, that the hand-writing to an instrument may be found by the jury on comparison of hand-writings, I see no reason why it could not be done in this case. On trial, the hand-writing to the bill of sale was proved by the deposition of ——— Parkhurst, Jr., who said he saw the defendant sign it.—With this evidence, in addition to the comparison of hand-writings, there is no good reason for granting a new trial on suggestion of forgery.

The defendant, in his requests for the County Court to charge the jury, *seemed* to think, that he was sued in trover, either for goods sold, or for goods pledged or pawned, and the action would not lie. But the Court considered, that the goods were mortgaged by the defendant to the plaintiff, to secure the payment of twenty-two or twenty-three dollars, which had not been paid, and the plaintiff's title to the goods had become absolute; and after the goods were demanded, trover would lie. Before we decide that the County Court took a correct view of this part of the case, we will have recourse to the books, and see if we can find a distinction in the law, between a pledge, and mortgage of goods.

Mr. *Powell*, in his valuable Treatise on Mortgages, Vol. 1, p. 3, says, "The striking distinction between a mortgage of lands, or goods, and a pawn of goods, is, that in

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the former case, the mortgagee has, after the condition forfeited, an absolute interest in the thing mortgaged, whereas the pawnee has but a special property in the goods, to detain them for his security. A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, or the course of trade to be a lien upon them." So in the same book, p. 33, *a. n.*, it is said, "That B., super-cargo of a ship, which was to go a voyage to the East Indies, having shipped on board goods and commodities, borrowed money on bottomry of A., and at the same time made a bill of sale of the goods and commodities, and of the produce and advantage thereof, to A., in nature of a mortgage, as a security for the money lent. The ship went her voyage, and those goods were sold, and others bought with the money arising by the sale, and those again invested in other goods, and so there had been several barters and exchanges of several sorts of goods. The ship returned, and B. died at sea, or on his return home; and it became a question between a judgement creditor of B., who got possession of these goods, and A., which of them should have the property. And one ground on the part of the judgement creditor was, that B's *keeping possession* of the goods after the sale, made it fraudulent, and void as to creditors. *Sed per* Cowper, Chancellor, *the trust of these goods appeared upon the very face of the bill of sale.* Though they were sold to A., yet he trusted B. to negotiate and sell them for A's advantage; then B's *keeping possession* of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale."—*Bucknal* vs. *Royston*, Pre. Chanc. 285. It was decided in the case of *Edwards* vs. *Harben*, 2 T. R. 587, "That in the transfer of Chattels, possession must *accompany* and *follow* the deed, and consequently, that where the assignment, or bill of sale is absolute, the possession must be delivered immediately; but where it is conditional, it will not berendered void by the vendor's continuing in possession till the condition be performed. So long ago as the case of *Stone* vs. *Grubham*, 2 Balst. 218, the Court held, that an absolute conveyance,

or gift of a lease for years, unattended with possession, was fraudulent; but that if the deed of conveyance be conditional, there the vendor's continuing in possession will not avoid it, because by the terms of the conveyance, the vendee is not to have the possession until he has performed the condition. And in *Kidd* vs. *Rawlinson*, 2 Bos. & Pul. 59, Ld. *Eldon* Ch. J. cites and sanctions the following passage from Bul. N. P. 258: 'The donor's continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money.

Chancellor Kent, in his 4th Vol. Com. 132, says, "A pledge or pawn is a deposit of goods, redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge, and is essential to its validity. The general property does not pass, as in the case of a mortgage; and the pawnee has only a special property. If no time of redemption be fixed by the contract, the pawnor may redeem at any time; and though a day of payment be fixed, he may redeem after the day. A mortgage of goods differs from a pledge or pawn in this, that the former is a conveyance of the title upon condition, and it becomes an absolute interest at law, if not redeemed by a given time; and it may be valid in certain cases without actual delivery."

In *Sturtevant* vs. *Ballard*, 9 John. R. 337, *Kent*, Ch. J., in delivering the opinion of the Court, says, "A conditional, as well as an absolute sale, may equally be fraudulent in point of law, as well as fraudulent in fact, unless the intent of the parties in creating the condition be sound and legal."

In *Barrow* vs. *Paxton*, 5 John. R. 261, the Court say, "The bill of sale stated in the record was a mortgage of goods, and not a technical pledge. A pledge is a deposit of goods to be redeemed on certain terms. Delivery always accompanies a pledge; but a mortgage of goods is often valid without delivery. Here, possession of the mortgagor was consistent with the face of the deed, and there is no pretence of fraud upon the creditors."

In *Holmes et al.* vs. *Crane*, 2 Pick. 607, "A debtor made

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a bill of sale to his creditor, of machines in a manufactory, on condition to be void on payment of a sum of money, and the vendee took possession by putting his hand on each piece of machinery: the vendee then made a lease of the machines to the vendor, and delivered them to him. Held, that this bill of sale was a mortgage, and that the possession of the vendor, after sale, was only *prima facie* evidence of fraud, which might be rebutted by showing the transaction to have been *bona fide*."

In *Brown* vs. *Bennet et al.* 8 John. R. 96, the Court say, "A mortgage of goods is a pledge, and more; for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas a pawnee has but a special property in the goods to detain them for his security."

In *Cortelyou* vs. *Lansing, Adm'r*, 2 N. Y. Ca. in Error, 200, the principles stated are, that "on the deposit of a pledge, where no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor. If the pawnee sell the pledge before application to redeem, he is answerable for the value of the pledge, at the time of the application."

In *Marsh* vs. *Lawrence*, 4 Cowan, 461, it is stated, "that a bill of sale or assignment of goods, declaring that the object is to secure the vendee as surety for the vendor, and that in case the vendee shall become liable, he may turn out the goods on the execution, or that they should be at his disposal at private sale, he accounting to the vendor for the proceeds, is in the nature of a mortgage."

In *Dawes* vs. *Cope, Assignee*, 4 Bin. 258, the Court decided, that where the deed or conveyance is conditional, or to take effect at some future time, the retaining of possession according to the intent of the deed, is not fraudulent.

The law makes an evident distinction between a pledge and mortgage of goods. And the County Court, in their charge to the jury, were correct in considering the goods in question mortgaged to the plaintiff, and not merely pledged to secure the payment of the debt which the defendant owed. After the goods were mortgaged to the

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plaintiff, he left them in the possession of the defendant, the mortgagor. Whether, on this account, the law would consider the mortgage fraudulent and void, as to the creditors of the defendant, we are not called upon to decide.—The defendant is not permitted to say it was a fraudulent mortgage of his goods to avoid it; for neither of the parties to the mortgage, though guilty of fraud as to others, can set up such fraud to avoid his contract. This point is well established.—See *Steele* vs. *Brown et al.* 1 Taunt. 381. *Robinson* vs. *McDonnell*, 2 B. & A. 134.—*Peaslee, Adm'r* vs. *Adm'r of Hay*, 1 Chip. Rep. 331.—*Fletcher* vs. *Howard*, 2 Aik. 115.

As the general property in the goods passed to the plaintiff by the mortgage, the defendant could not subsequently acquire that property by merely possessing and using the goods one year, by consent of the plaintiff. So, after the year had elapsed, the plaintiff having demanded possession of the goods according to the tenor of the defendant's receipt, and the defendant having refused to let the plaintiff have the goods, can maintain trover for them.

On the whole, we are satisfied with the proceedings, and judgement of the Court below in this action.

Judgement affirmed.

Sawyer, for plaintiff.
Prentiss, for defendant.

SKINNER & HURD *vs.* MCDANIEL & GARVIN.

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If, in the return of the levy of an execution on real estate, as recorded in the Town Clerk's office, it appears that the levy was for a larger amount than the execution, no title passes by such levy, notwithstanding the return appears to be correct on the original execution.

Such record, would be notice only of a void levy; and purchasers and attaching creditors might consider it as void.

The execution and return in such a case are not recorded in the Town Clerk's office as directed by statute.

This cause came up from the County Court upon the following bill of exceptions: Ejectment for 77 acres and 52 rods of land, taken from the east side of Lot

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No. 13, in the township of Hydepark, drawn to the original right of Roger Enos, Jr., being in the first division of said town. Plea, *not guilty*.—Issue thereon.—Possession of defendants admitted.

On trial of the issue aforesaid, the plaintiffs gave in evidence the copies of a judgement rendered in Orleans County Court, on the fourth Monday of June, 1820, by which it appeared, that the lands in question, were by the said Skinner and Hurd attached on *mesne process* as the property of Jacob P. Hadley, upon which process, the judgement aforesaid was rendered in their favor against said Hadley, for the sm of $1001,76 damage, and $19,15 costs of suit.—That execution afterwards regularly issued thereon, dated 3d July, 1820, for the damages and costs aforesaid; and that on the 2d of August, 1820, the Sheriff of said County levied said execution by extending the same on said lands.

The plaintiff also produced a copy from the records of the County Clerk, which shewed the return and recording of said execution in his office, on the 3d September, 1820. Also a copy from the Town Clerk's office, in Hydepark, shewing that said Sheriff left a true and attested copy of said execution, levy and return in said Town Clerk's office for record, on the 3d August, 1820, which was then recorded, but differing from the return on the execution in this, that the execution showed the amount of land appraised to satisfy it, to be $1044,34, whilst the copy from the Town Clerk's office shews the amount to be $1275,52—the lands being the same described in the return on the execution, and the copy left with, and recorded by the Town Clerk. Also another set of copies of said execution and officer's return thereon certified—the one by the County Clerk—the other by the Town Clerk of Hydepark, by which it appeared, that said execution and Sheriff's return were recorded in the Town Clerk's office on the 27th day of September, 1824, and in the County Clerk's office on the 21st December following. All of which copies of records were objected to by the defendants, and excluded by the Court, and are now made part of this case.

It was admitted by the defendants, that McDaniel went with the Sheriff and appraiser, and helped survey said lands, when the same was set off, and appraised as aforesaid.

Defendants then offered in evidence a deed of mortgage from Jacob P. Hadley to John McDaniel, dated the 10th day of January, 1821, of the lands in question, and a decree of foreclosure of the equity of redemption against the said J. P. Hadley and these plaintiffs, in 1827. Also an assignment of a vendue title obtained upon a tax granted by the Legislature, A. D. 1822, for making roads, both of which were objected to and admitted by the Court, and now copies of which are made a part of this case.

The plaintiffs offered to show, that at the time of the sale of the lands to N. P. Sawyer, Esq., to satisfy the tax aforesaid, he acted as agent to said McDaniel, and after the forfeiture, deeded them to McDaniel, for whom he acted; but the Court were of opinion such evidence was inadmissible, and rejected it.

To which decisions of the Court, the plaintiffs except. The exceptions are allowed, and the cause ordered to the Supreme Court for revision.

After argument, the opinion of the Court was delivered by

WILLIAMS, J.—The plaintiffs make title to the land in question by the levy of an execution in their favor against one Hadley; the defendants claim by a deed from Hadley. The levy of the execution is objected to, as not being in conformity to the statute. It appears that an execution in favor of the plaintiffs, amounting in the whole, with the expense of the levy, to the sum of one thousand forty-four dollars and thirty-four cents, was levied on the land in question. The Sheriff who levied the execution, left with the Town Clerk of the town where the land was situate, a copy of the execution for record. The copy of the execution was like the original, except, that in stating the levy and appraisal in the copy, after giving the names of the appraisers, it was recited as follows, "who on their oaths have appraised the same at the sum of twelve hundred seventy-five dollars fifty-two cents, to the full satisfaction &c." Thus apparently levying upon land, to to the value of two hundred thirty-one dollars eighteen cents, more then the amount of the execution, and the officer's fees thereon. This was so recorded in the the Town Clerk's office. On the original execution, the of-

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ficer returned the appraisal to be $1044,34, the true amount of the execution and fees. The question is, whether this execution has been recorded in the Town Clerk's office according to the requirement of the statute.

As a majority of the Court, at the last term, were of opinion, that a record made from a copy of an execution was valid, that question has not been argued at this time.

In the conflicting opinions which were entertained by the members of the Court at the last term, when the subject of these levies were before us, I believe there was no doubt entertained by any, but that the execution must be recorded in the Town Clerk's office, either from the original or a copy. There was a difference of opinion as to what should constitute a recording, as well as the object of it; the Chief Justice considered that it was for the purpose of notice only. From the report of the case and from the opinions then expressed, I think I may say without contradiction, that all the other members of the Court, who were present, thought the recording was essential to pass the title. In the view which we take of the case before us, I do not know that it would make any difference, whether the record in the Town Clerk's office should be considered as solely for the purpose of giving notice, or as necessary to pass the title.

If the levy, as it appeared on record, was apparently a void levy, the record, was notice only of a defective and void levy. If recording was necessary to pass the title, then no title passes if there has been no true record. We apprehend, that can never be considered as a true record which varies in any material part from the original. A mere clerical error or a difference unessential, between the record and the original, would not, and ought not to invalidate the record. A trifling variance in the description of the land or in any other part, would usually carry with it evidence of being a mere clerical error, and would be undeserving of consideration. Rut if the error was in a material part, and there was no means, by the record, to ascertain that it was an error, it would require more consideration.

Now, I apprehend, if in recording a deed, one of the witnesses, the name of the grantee or the acknowledge-

ment should be omitted, that it would not be considered as a good record, and that it would only be notice of a defective conveyance. If in the record of a vendue, some fatal defect should appear in the proceedings; in the record of an attachment, it should appear that the writ was not signed, or not returnable to any Court; in the record of an exection, that the land was not appraised by three freeholders, one omitted by mistake, or that no officer signed the return, or any other omission in a material part, that in neither of these cases would the law, which requires such record to be made, be considered as complied with—that we should not say to one who had acquired a title having no other notice of these proceeding than what appeared from the record, that he should have applied to the grantor to inspect the original deed—that he should have gone to the collector of the land taxes to examine his proceedings, or to the office of the Clerk or Justice to examine the original attachment or execution—and if all these were found to be correct, the apparent deficiency in record of the deed, collectors proceedings in the sale of land for taxes, record of attachment, or execution were immaterial and of no consequence. In my opinion, this would destroy every beneficial purpose arising from records of title to real estate. It may, then, be enquired where shall we draw the line, what error shall destroy a record, and what shall not? I can lay down no better rule, than the one which the Court has laid down in other cases. That when a record is required to be made, or a copy to be delivered, and the record or copy is made operative either to pass or create a title, or for the purpose of notice to effect another and lay upon him duties to be performed, or as a notice on which after proceeding are to be had, or as a notice of title, if the record or copy contains such defects, as would render the original, from which the record or copy was taken, void if it contains the same defects, then it may be considered, that no record has been made, or copy delivered. Purchasers, or those who are to be affected by the notice to be derived from a record or copy, may consider the original as similar to the record or copy, and therefore treat it as void. This was the view of the Court, expressed in the case of overseers of poor, of *Barnet* vs. *Overseers* of poor of Concord, Caledonia County, March

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1832; *Herring* vs. *Harmon*, Orleans County 1832; and *Huntington* vs. *Cobleigh*, Caledonia County 1833.

If we test this case by that rule, we must then enquire whether, if the return on the original execution had been similar to the one as appeared on the record of the Town Clerk in Hydepark, it would be such a levy and return as would divest Hadley of his property and vest it in the plaintiff; and we think it would not in any view which can be taken.

From such a return, it would appear certain that land of the value of $1275,52 had been taken and levied on, to satisfy an execution, amounting with the cost of levy, to only $1044,36. There would be nothing in the execution or return to show that this had not been done; but the conclusion would be certain that a levy and appraisal to this amount had been made. It would be apparent that an error had intervened either by accident or design; but whether the error was in stating the amount of the execution or the amount of the levy, could not be ascertained. The addition of the bill of fees to the amount of the execution, at the bottom of the execution, making the sum for which the levy ought to be made, does not in any manner shew that there was a mistake in *describing* the same in the return, or that the levy was for a less amount than what it appeared to be. From the execution and return, together with the bill of fees annexed as recorded, no other conclusion could be drawn, except, that the officer had, by mistake or design, set off to the creditors lands of the value of between two and three hundred dollars more than he was authorized to do. There could be no question but that such a levy must be void.

It was said by brother Baylies at the last term, 4 Vt. Reports p. 428, that if the record does not agree with the execution and return, it is erroneous; and whether the record be void or not will depend on the error it contains.—If the error lead not to the injury of any person, and the record is sufficient to answer all the purposes for which it is made, then it is not void." It has been urged here in argument, that the mistake in this record cannot possibly injure the debtor or his assigns; and it is admitted in the argument that if it would have this effect, there might be a

propriety in setting it aside. This, as far as it respects the debtor in the execution may be true, that it does not injure him; but to say that the mistake cannot injure his assigns, is begging the question altogether. As far as it respects the debtor, it may not be of any consequence whether any mistakes have been made in the record in the Town Clerk's office, or whether any record is made there at all. He is a party to the judgement. If he wishes to redeem, he resorts to the office of the County Clerk, and not to the Town Clerk. I fully concur in the opinion which has been expressed, that it is of no possible use to the debtor to require any record in the Town Clerk's office for his benefit. That, as to purchasers, the Town Clerk's office where deeds are recorded, is the office to which they are to resort to ascertain the situation of a title. 4 Vt. Rep. 436.

If the office of the Town Clerk, is the office to which a purchaser is to resort, and if a purchaser, on resorting there to ascertain the situation of a title, finds a levy of an execution, apparently illegal and void, and should purchase or take a mortgage of the owner, whose land would not be divested by a void levy, or should attach the same; he would be injured, if it should afterwards appear that the levy was recorded erroneously, that the original was correct, and the original levy should prevail, notwithstanding the mistake. Such a mistake would lead to the injury of the purchaser or attaching creditor, the assignee of the judgement debtor, and therefore void upon this principle. If any mistake in the record of the levy of an execution in the Town Clerk's office will avoid the levy so as to prevent any title passing to the creditor, if the the record then is for any valuable purpose, we think the mistake in the record of the levy of this execution is one which will avoid it, and that no title passed to the plaintiffs.

The result of the whole is, that this execution was not truly recorded in the Town Clerk's office in Hydepark; the record being so essentially defective and variant from the original, that it would be considered as notice only of a defective levy; and the requirement of the law not being complied with in the levy of the execution, the plaintiffs' acquired no title thereby.

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The judgement of the County Court is therefore affirmed.—BAYLIES, J. dissenting.

Young & Paddock, for plaintiffs.

Sawyer, for defendants.

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OTIS THOMPSON vs. WILLIAM ARMS.

The Court, in examining the proceedings of the County Court, sit as a Court of Error; and can only examine the record.

Reports of auditors must present all the questions of law, by them decided, which the parties require to have examined by the Court on accepting or rejecting the report.

No affidavits or statements of auditers, not incorporated in their report, can be heard in objection to accepting the same, unless it be to shew misconduct in the auditors, or that they refused to state the facts, so as to present the questions of law, or for the purpose of shewing new discovered evidence,

The determination which the County Court makes on affidavits used for the purpose aforesaid, is not subject to be re-examined by this Court.

When the County Court have accepted the report of auditors, the Court will not remand the cause to them to enable the party to move that Court to recommit the same to auditors, especially in a case where the sum is small, and there was evidence on both sides.

This was an action on book, commenced in the County Court, where a judgement to account was rendered, and auditors appointed, who made a special report of a small sum in favor of the plaintiff. The report was accompanied by a statement of one of the auditors expressing a different opinion upon the facts, from that of the majority of the board. It was also accompanied with an affidavit of the defendant's attorney, who coincided with the dissenting auditor in relation to the weight of testimony. A reference to the opinion of the Court will make any further statement of the case here unnecessary.

The defendant made several objections to the report; but the report was accepted. Exceptions being taken by the plaintiff and allowed by the Court, the case comes here for revision.

After argument, the opinion of the Court was delivered by

WILLIAMS, J.—This is an action on book. After judgement to account, it was referred to auditors to take the account, who reported in favor of the plaintiff, and made a

special report. Objections were made to the report by the defendant; but the County Court accepted the same, and on exceptions taken to the judgement of the County Court, the cause has come before us.

The Court, in reviewing the proceedings of the County Court, set as a Court of Errors; and the only enquiry which can be, is, whether the County Court erred on any question of law before them. This can only be ascertained by an examination of the records. It is wholly useless to bring before us affidavits or statements from one or more of the auditors, as they cannot be taken into consideration. The report of the auditors must contain all the questions of law arising before them and upon them. The County Court make their determination, and it is that determination which we are to review. The County Court should never hear any objections to reports of auditors founded upon affidavits or statements not incorporated into the reports, unless to show misconduct in the auditors, or to show new discovered evidence as a ground for a new trial; and for this reason, that their determination, founded on such statements or affidavits, cannot be examined by the supreme tribunal. If any question of law arises in the course of investigation before auditors—if they receive or reject testimony improrerly,—in short, if they determine any question of law in the course of the trial, which the parties wish to have reviewed by the Court who appointed them, those questions must be stated by the auditors in their report, so as to become a part of the record. Then the Court who appointed them can ascertain whether they have misjudged; and a Court of Errors can also determine whether the Court who accepted the report made any mistake in judgement.

On all questions of fact, the auditors are the sole judges: and their determinations on questions of fact, are not to be rejudged by the Court. As the auditors are the judges of the weight of testimony, and as their decision upon the testimony cannot be made the ground of exceptions to the report, it is useless to incumber the report with a statement of facts, unless for the purpose of bringing up some question of law arising out of the facts; and it is still more useless to present to the Court, who are to accept or reject their report, statements of one or more of the auditors or

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affidavits, which are not by the auditors made part of the report.

If the auditors refuse to state questions of law on which they decide,—if they refuse to state on what ground they made any determination, so that it cannot be ascertained whether it was upon a question of fact or of law; or if they act improperly, this may be a ground of exception to their report to be verified by affidavit, and the Court who appointed them can thus set aside their report. But the determination of the Court upon such such affidavits, would, in that case, be final, and could not be re-examined in a Court of Error. Except for this, or some similar purpose, no affidavits should ever be received in opposition to a report of auditors.

This view of the law disposes of the case now before us. It appears that the plaintiff charged a quantity of coal.—The auditors found that all but a small quantity was delivered to the plaintiff as payment either in whole or part of a certain contract which one Chase had made with the plaintiff; of course they disallowed that charge. The auditors found that a small quantity of the coal had been delivered by the plaintiff to the defendant, for which he was to receive a scythe, which he had not received; and for the value of this, they find the defendant indebted to the plaintiff. In all this they determined upon the weight of testimony, and upon that, their determination was final.

A motion is now made by the plaintiff to remand this cause to the County Court; but we see no reason for this. If this judgement ought to be reversed, we must reverse it, and appoint auditors to determine this controversy. If we send it back to the County Court, their judgement ought to be the same as it was before, to wit, they must accept the report. We have no reason to believe that the County Court would send this subject again to auditors. The amount in controversy alone would forbid that course. The sum in controversy is too small to be the subject of a protracted litigation. As a matter of favor, we should not be disposed, if it was practicable, to remand this cause to the County Court. Upon this motion, however, we have examined all the papers, and have no reason to believe that the auditors made any mistake. They rejected evidence of the

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contract of Chase, it is true; but they found some part of the plaintiff's charges were for coal delivered on that contract, and therefore disallowed them; and the contract had no connexion with the charges which they did allow. It is true the auditors did not agree in relation to the facts.—A majority thought certain facts were proved—the other auditor thought they were not: and the attorney coincides in opinion with the auditor who dissented; but who can say, that the same, or another set of auditors, might not again disagree, or that they would come to a different conclusion. The manner in which these facts and testimony are presented to us by the report of a majority of the auditors, two additional reports or statements from the one who disagreed with them, and the affidavit of the defendant's attorney, show how utterly unsafe and improper it would be to decide upon any question presented in this manner. We can see no purpose to be answered by remanding this to the County Court.

The judgement of the County Court must be affirmed.

Marsh & Leslie, for plaintiff.

Redfield, for defendant.

STEPHEN STONE *vs.* CHARLES SEAVER.

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A writ of *Audita Querela* is not within the eleventh section of the Statute of Limitations, which requires writs of error, &c. to be brought within a year from the rendition of the judgement.

It is not necessary in a writ of *Audita Querela* to allege that the act complained of, was done fraudulently and deceitfully, especially if the acts complained of do shew fraud and deceit in the party.

Where a plaintiff procures a deputized person to make a return that he served a writ by leaving a copy with the defendant, when he knew that no such copy was left, and that no notice was given to the defendant, and takes a judgement thereon, such judgement will be declared null on a writ of *Audita Querela*, and the party against whom it was rendered may recover all damages which he has sustained thereby.

Such *Audita Querela* may be maintained, although no execution has issued on the judgement.

This was an *Audita Querela* to set aside a judgement of the defendant against the plaintiff, rendered by a Justice of the Peace, on the 14th day of January, A. D. 1829, on the

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ground of fraud in obtaining said judgement. The attachment in the original suit was served by an authorized person, and the complaint of the plaintiff is, that the defendant procured said authorized person to indorse on the back of said writ that he had served the same on the plaintiff, by attaching as his property, ten tons of hay; and on the same day, left a true and attested copy of said writ, with a list of the property endorsed thereon, with the plaintiff; when the defendant well knew that said authorized person had left no such copy with the plaintiff, and that the plaintiff had no notice of said suit against him. The writ being returned to the Justice, a judgement by default was rendered. The declaration contained no direct allegation of fraud and deceit in obtaining the judgement complained of.

The defendant plead in bar, that the *Audita Querela* was not commenced and served within one year next after the rendition of the judgement sought to be reversed, nor within one year after the judicial proceedings had.

To this plea the plaintiff demurred.—And joinder by defendant.

Young & Hill, for plaintiff.—The judiciary act, passed March 2d, 1797—Rev. Laws, p. 61, Sec. 12—directs, "that on *any judgement* rendered by a Justice of the Peace, either by confession, or otherwise, the writ of *Audita Querela* shall be allowed," &c.

The Justice Act, passed March 4th, 1797—Rev. Laws, p. 126, Sec. 7—directs, "that no judgement, sentence or decree, had or rendered by any justice of the Peace within this State, on the merits of any cause or action, within the jurisdiction of a Justice, shall be removed by a *writ of error*, *certiorari*, or any other process whatever; or shall be re-examined, or reversed by the Supreme Court of Judicature, any law, usage or custom to the contrary notwithstanding."

The Limitation Act, on which the defendant relies, was passed November 6th, 1797—Rev. Laws, p. 291, Sec. 11. That act applies expressly and solely to matters of error and defect, where the proper remedy would be by *writ of error*, or some suit in the nature of that writ; and has no

more effect in limiting the operation of a writ of *Audita Querela*, than the *preceding* Justice Act has in doing away *entirely* its operation upon the judgements and doings of a Justice of the Peace; for the plain reason, that no suit in the nature of a writ of error can apply *there*, being taken away by statute previous to the passing of the Limitation Act. This act, therefore, must necessarily be confined in its operation to judgements and doings of the County Court, and such other Courts, whose errors and defects might have been remedied at the passing of this act, and *still* might be remedied, by writs of error or suits in the nature of that writ. It can only apply to writs or suits for the correction of errors or defects in a judgement either *in law* or *in fact*, committed by the Court; and cannot apply to a case coming before the County Court as by original writ, founded solely upon the fraud and misconduct of the recovering party. The Statute of Limitations does not even mention this writ, or this kind of remedy; nor could this kind of wrong or injury, or the mode of redressing it, ever have been contemplated by that statute.—Chip. Rep. p. 387.—1 Vt. Rep. p. 433.—-2 Vt. Rep. p. 407.—-1 Aik. Rep. p. 107–321–359–363.

We contend that the plaintiff is entitled to relief; and without the aid of an *Audita Querela*, the arm of the law would be quite too short to relieve against this most daring and obnoxious of all practices under color of legal proceedings. This mode of obtaining relief was the only one extant. The record shows a judgement which remains good for eight years from its rendition, without this remedy. And if a judgement be obtained, however gross the fraud, or ingenious the stealth, according to the doctrine contended for by the defendant, after a lapse of one year from the date of the record thereof, it would be a valid judgement to all intents and purposes, even against the remedy here sought. If so, it might be again sued and enforced without a possibility of relief.

A defence in a suit on such judgement must be of no avail: that is not the way of avoiding a recorded judgement. In such case, the corrupt party would always keep his judgement a secret till after the year had expired.

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plete relief from impending evils which appear to have the sanction of judicial proceedings. Thus a judgement wrongfully obtained is to be relieved against as expressed in the case *Weeks* vs. *Lawrence*, 1 Vt. Rep. p. 433.

So it operates to relieve against an execution already levied, though wrongfully, as in the case *Hurlbut* vs. *Mayo*, Chip. Rep. 387.

Hence the objects of *Audita Querela* seem to be broad in their beneficial purposes—always intended to operate upon the wrong of the party against whom it issues; but still to relieve against some matter of record, by which the party does or may attempt to avail himself. And it cannot be necessary that he shall be in the very act of oppressing his adversary; but that he has it in his power, unless his hands be staid.

J. Fletcher, for defendant.—The writ of *Audita Querela* was prayed out on the 12th day of April, 1831, and service made on the defendant on the 30th day of said April, being more than a year next after the rendition of final judgement by Justice Skinner.

The only question raised in the case is, whether an *Audita Querela* must be prayed out and served within one year next after final judgement sought to be reversed by the same.

The statute requires the action to be brought in one year.—Stat. 291.

The judgement before Skinner is sought to be reversed by this writ for error or defect.

This is a suit for that purpose. The case is within the provisions of the act.

The opinion of the Court was pronounced by

WILLIAMS, J.—This is a writ of *audita querela* to which the defendant pleads the Statue of Limitations in bar.—The Statute is "that no judgement or proceedings in Courts of Justice in any real or personal action shall be

It is considered that the writ of *Audita Querela* is in the nature of a bill in equity, for the purpose of obtaining com-

reversed or avoided for any error or defect therein unless the writ of error or suit for reversing such judgement or proceedings in course of justice be commenced and duly served on the defendant, or defendants in error, within one year next after the rendition of the judgement, or within one year next after such error or defect shall have intervened." To this plea the plaintiff has demurred:

The Courts in this State have considered the writ of *audita querela* as a remedy applicable to cases like the one set forth. In the case of *Marion* vs. *Wilkins*, 1 Aik. 107, and in the case of *Dodge* vs. *Hubbel*, 1 Vt. Rep. 491, it was recognized as a principle in our system of jurisprudence, that an *audita querela* is a proper remedy when a judgement of a Justice of the Peace has been obtained against a party, who has had no suitable notice to appear and defend against the same. It is emphatically the proper remedy when a party has been precluded from having notice by the misconduct of the party who obtained the judgement. To maintain this writ, it is not necessary that the party who brings it, should be actually in execution. It is sufficient if he is liable to an execution on a judgement obtained against him without notice. He may sustain his writ of *audita querela quia timet*.

The object is not always to annul or vacate a judgement. It frequently supposes the judgement to be regular and is brought to set aside the execution. The object is sometimes for the recovery of damages alone. Annulling the judgement is rather the incidental than the direct object of the writ.

It is not a writ of error, or in the nature of a writ of error or *certiorari*, to reverse a judgement. The judgement therein is never to affirm, though it sometimes is to vacate a judgement. If it were a writ of error or in the nature of a writ of error, it would not be brought to examine a judgement rendered by a Justice of the Peace, as the judgement of a Justice of the Peace, can only be reversed on appeal; and are not subject to removal, or to be re-examined or reviewed in the language of the Statute "by writ of error *certiorari* or any other process whatever, (sec. 7 Justice act) whereas it is expressly admitted by the 12th Section of the judiciary act, that a writ of *audita querela*

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may be brought on a judgement rendered by a Justice of the Peace.

It differs from a writ of error or *certiorari* in this, an *audita querela* is founded upon facts not appearing on the record and not before the Court who rendered the judgement. These facts must be set forth. They may be traversed or their sufficiency denied by a demurrer. It is in the nature of an original suit, or as it is sometimes said, in the nature of a bill in equity. A writ of error is founded upon the record, brings it up for the examination of the record and correction of any errors intervening therein. Unless it be for some error in fact, as infamy, &c., no issue of fact can be joined thereon.

A writ of *certiorari* brings the record and in some cases the evidence upon which the adjudication was had by the inferior tribunal, and when they are certified, the Supreme Tribunal determine upon them whether the decision of the inferior was correct, and either affirm or quash the proceedings, but no facts are to be controverted and tried by jury.

From this view of the nature of a writ of *audita querela*, it is obvious that it does not, and cannot come within the section of the Statute of Limitations before mentioned.

That Section (Sec. 11 Limitation Act) appears designed to limit the time within which a writ of error, or writ in the nature of a writ of error shall be brought for the purpose of reversing a judgement. It speaks of the defendant or defendants in error, also, of errors or defect in the judgement; and although the term made use of is more general, to wit, "the writ of error or suit for reversing the judgement" yet we think that by the term suit, must be understood such a suit as brings the record in controversy, and has directly for its object the reversing a judgement for some error or defect therein, and is in the nature of a writ of error. In this view it would probably embrace the writ of *certiorari*.

It is very clear that it would not be extended to all writs of *audita querela* as the cause for which the writ may be brought may not arise in many cases under more than a year from the rendition of the judgement, as in the case of payment or discharge of one of two joint debtors from

commitment on an execution, and an *alias* execution issuing more than a year thereafter.

Moreover as an erroneous judgement supposes that the party had regular notice of the process on which the judgement was rendered, he knows whether error has intervened. In those proceedings which are subject to be reversed or quashed on *certiorari*, the party is supposed to have notice and may well be limited to bring his writ to reverse the judgement within a year.

But in a judgement like the one here complained of, the party is supposed to have no notice. He may neither know of the judgement or the manner in which it is procured until years after it was rendered. To limit him to a year within which he must bring his suit would in effect deny the remedy altogether.

As the section of this Statute does not name a writ of *audita querela*, as it could not with propriety be extended without doing violence to the spirit of the law giving the remedy, as well as the Statute of Limitations, we are of opinion that tne plea does not interpose any bar to the plaintiff's writ.

This will lead us to examine the complaint, and inquire whether there are those defects in it which have been urged. It is said there is no allegation of fraud and deceit in the defendant, and we are referred to the case of *Lovejoy* vs. *Webber*, 10 Mass. 101, where it is said that such an allegation is essential. The book is not in town so that we can examine the case. If it decides that the words *fraudulently* and *deceitfully*, must be made use of in a writ, without which it would be bad, I should hesitate before I could subscribe to the authority. If it decides that those facts must be set forth which show fraud and deceit in the party complained of, this declaration is not liable to objection on that account.

Though somewhat loosely drawn and though it does not particularly specify the manner in which the writ was served, yet it does say that the defendant caused a return to be made by the person deputed to serve the writ, that a copy was left with him when he (Seaver) knew no such copy was left, and that complainant had no notice of the suit. This is a sufficient allegation of fraud and deceit in

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the defendant, to satisfy that requirement in the declaration if it be necessary.

If this return had been made by a Sheriff or a regular officer, it might be questioned whether such an allegation would be received against his return. Whether his return would not be conclusive as to that part, not to be controverted in a writ of *audita querela* and the party left to take his remedy for a false return.

Rut however this may be as to returns made by the regular officers, no such effect can be given to a return of service made by a person deputed at the risque and request of the plaintiff in a suit. The acts and doings of such a person, if done at the request and by the procurement of a plaintiff may be treated as the act of the plaintiff himself and are not entitled to that confidence which is reposed in the doings of a Sheriff or Constable.

We do not discover that the declaration is insufficient or that it will not stand the test of a demurrer. The judgement of the Court is that the plea in bar is insufficient, and the judgement rendered as purported to have been rendered by John Skinner, Esq. a Justice of the Peace in favor of the defendant, Seaver, against the complainant, Stone, is hereby annulled, and the plaintiff recover his damages and costs.

MOSES CHASE *vs.* HENRY SMITH.

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A written entry in a book, made by a person against his interest at the time, is, after his death, admissible as evidence of the fact between third persons, if he could have been examined to it in his life-time.

At common law, a party to a suit cannot give in evidence his own book, without the evidence of some third person to show that the entries were justly made.

The defendant to an action shall not be permitted to defeat the claim of the plaintiff by crediting such claim to the account of a third person, and giving the same in evidence to the jury, without evidence that the plaintiff consented to such credit.

A party to a suit shall not make evidence for himself.

A father can *verbally* sell, or give his minor son his time, till he is 21 years of age; and after that, the son is entitled to his earnings.

This was an action of *Assumpsit* for work, labor and ser-

vices, done and performed by the plaintiff, for and at the special instance and request of the defendant, in the year 1826—plaintiff claiming forty dollars.

The defendant plead the General Issue, *non-assumpsit*, and gave notice that when said labor was performed, he was partner with one Walker, in trade; and that the plaintiff was a minor, under twenty-one years of age. Issue joined to the country.

The plaintiff, to support the issue on his part, gave evidence to the jury tending to prove, that in 1825, he was seventeen or eighteen years of age; and in that year, his father gave or sold the plaintiff his time till he was twenty-one years of age.—That there was no writing witnessing this gift or sale.—That afterwards, in March, 1826, the plaintiff told the defendant, that the plaintiff's time was his own, and let himself to the defendant for $9,50 per month, to work for him six months, if they so long agreed.—Plaintiff to receive his pay in a yoke of steers, and some clothing and money.

The defendant agreed to pay the plaintiff *in persona* for his labor, and not try to turn it on an old debt which the plaintiff's father was owing the defendant and Walker.—Plaintiff went to work for the defendant in said March, and left off in July after, and the defendant had paid the plaintiff nothing for his services.

The defendant gave evidence tending to shew, that it was not a matter of notoriety that the plaintiff's father gave or sold the plaintiff his time in 1825, or at any other time: also gave evidence tending to shew, that the father hired out the plaintiff to labor subsequently to the plaintiff's labor for the defendant, and recovered pay for the same.

The defendant offered in evidence the company ledger, containing the account against said Chase, the elder, which account was previous to the plaintiff's work for the defendant. And in this account, said Chase, the elder, had credit for the plaintiff's labor.

The plaintiff objected to said book going to the jury as evidence, and the Court excluded the same. To which the defendant excepts.

The defendant requested the Court to charge the jury

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that the father could not make a verbal or parol contract with is son to emancipate or free him from the legal natural ties to his parent, but the same contract should be in writing. 2d, If a parol or verbal gift or contract could avail, so as to emancipate the son and enable him to make contracts independant of the parent, such gift or contract should be made public before it affects third persons. 3d, If the jury should find the fact, that the father had attempted to appropriate the plaintiff's work and labor to his own use, or to bring it in to file against the defendant, it is not in the power of the defendant to resist the father's claim, unless the defendant is in possession of a writing, or there is a notorious declaration of the father that he had given his son his time.

Charge.—There can be no doubt the father can verbally sell or give his minor son his time; and if this be done, the son is entitled to his subsequent earnings. If, from the evidence, you find that Samuel C. Chase, in 1825, did sell or give his son Moses his time till he was twenty-one years of age, then you will find, that the plaintiff had a right to hire himself to the defendant, and receive his wages: and if you find that the plaintiff, having this right, did hire himself to the defendant, and labor for him nearly three months in the spring and summer of 1826, you will find for the plaintiff to recover what he merited, and the interest of the money from that time to this. But if the plaintiff's time was not his own, and he had no right to receive his wages, you will find for the defendant his costs.

The jury returned a verdict for the plaintiff his damages and costs. The defendant excepted, because the Court did not charge as requested, and because they charged as above. Exceptions allowed, and the case ordered to the Supreme Court for final decision.

After argument by counsel, The opinion of the Court was pronounced by

BAYLIES, J.—The bill of exceptions shows that the dedefendant offered in evidence the company ledger containing the account against said Chase, the elder, which account was previous to the plaintiff's work for the defend-

ant. And in this account, said Chase, the elder, had credit for the plaintiff's work. The plaintiff objected to said book going to the jury as evidence, and the Court excluded the same.

It was decided in the case of *Higham & wife* vs. *Ridgway*, 10 East. 109, that if a person have peculiar means of knowing a fact, and make a declaration, or written entry of that fact, which is *against his interest* at the time, it is evidence of the fact, as between *third* persons after his death, if he could have been examined to it, in his life time. And therefore an entry made by a man-midwife, in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.—(See also 4 T. R. 514-669.—5 T. R. 121.—1 Camp. 367.)

But at common law, a party to a suit cannot give in evidence his own book without evidence to support it: This appears in the case of *Price* vs. *Torrington*, Salk. 285—"The plaintiff being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a deliver; otherwise of the shop-book itself singly, without more."—(See also *Pitman* vs. *Maddox*, Salk. 690.—Bul. N. P. 282.)

In the case of *Lewis* vs *Norton*, 1 Wash. 76, the Court say, "Ever since the decision of Ld. Torrington's case, the law has been settled, that a book of accounts in the handwriting of, and kept by, a clerk, who is since dead, is proper evidence upon these facts being proved."

But the case at bar, does not come within any common law principle. Here the defendant credited the plaintiff's labor to the old account of the plaintiff's father, without the knowledge or consent of either of them. Unless there

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was evidence tending to show, that the plaintiff consented that his labor should be credited and applied in payment of his father's *old* debt, it would be extremely wrong to suffer this entry in the ledger to go to the jury as evidence: it would be saying, the defendant had a right to make evidence for himself, and with it defeat his own solemn contract, by turning the plaintiff's labor to pay his father's *old* debt, contrary to what was expressly agreed between the parties.

The County Court, in their charge to the jury, say, "There can be no doubt the farther can *verbally* sell or give his minor son his time; and if this be done, the son is entitled to his subsequent earnings." This doctrine *seems* to be well established by the decision of this Court, in the case of *Joseph Chase 2d* vs. *Curtis Elkins*; 2*d* Vt. Rep. 290. In that case, the Court did not consider that the contract between father and son must be proved by writing.

We find no fault in the proceedings of the Court below in this action; therefore,

Judgement is affirmed.

Young & Hill, for defendant.
Sumner & Fletcher, for plaintiff.

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SAMPSON DAVIS *vs.* ZERAH BEEBE.

When a suit before a Justice is continued for notice, and the plaintiff, before taking out execution, enters into a recognizance to refund what may be recovered by a writ of review, according to the provisions of the 18th Section of the Justice Act, the party cannot plead in bar to such writ of review that the defendant was in the State at the time judgement was rendered against him.

The proceedings of the Justice, in such case, are equivalent to an adjudication that the defendant was out of the State, and had no notice of the suit.

This was a writ of review, brought to reverse a judgement of a Justice of the Peace, in favor of the defendant against the plaintiff. From the declaration it appears, that the defendant commenced his process before Charles Kingsbury, Esq. returnable on the 23d day of August, 1828, when the cause was called, and the present plaintiff not appearing, was continued to the 25th of August, for notice to the defendant. On that day, a judgement against

the then defendant was rendered by default; but before execution issued, a suitable recognizance was given by plaintiff to refund, in case of review, according to the statute. This suit was brought before the said Justice who rendered the original judgement in favor of *Beebe* vs. *Davis*. Judgement was rendered for the defendant; whereupon, the plaintiff appealed to the County Court. In the County Court the defendant plead in bar, that at the time when he commenced his original suit against the present plaintiff, said plaintiff was not out of the State.

To this plea the plaintiff demurred specially, and assigned for cause, "that the said Beebe has not averred that said Davis had notice of the service of his (said Beebe's) process before said action was defaulted." Joinder by defendant.

Upon these pleadings, the County Court rendered judgement for defendant, and exceptions being allowed to plaintiff, the case is now presented to the Supreme Court for revision.

Mr. Starkweather, for plaintiff, insisted, in substance, that independent of the statute in relation to review, Sec. 18th of the justice act, the only remedy, where a defendant had been deprived of his day in Court for want of notice, was by *Audita Querela*, which was always an inadequate, and many times an insufficient remedy. Hence, this statute being very beneficial, should be liberally construed.

He further contended that the expression of the statute "*out of the State*, means simply out of the reach of notice, and is not intended for exclusive application:

1st, Because, as we have before seen, one of the benefits to be derived from this enactment, was to prevent the obtaining of clandestine judgements, and to secure to the defendant his day in Court.

2d, Because, the distinction between one's living in or out of the State, would be without the least shadow of reason; for it is as manifestly unjust, that a wrongful judgement should be obtained against a man, and carried into execution while he remains within, as if he were beyond our boundary line; and it would seem the reason would be stronger in favor of the man who remains; for if he depart,

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his personal security is entrusted to other laws—if he remain, our laws should not only secure to him the right of private property, but should guarantee to him the most sacred of all rights, the right of personal liberty, which might be very materially affected by permitting false judgements.

3d, Because, a different construction is altogether inconsistent with the obvious meaning of other parts of the same section; and in determining the meaning of a part, the whole should be taken into view.—6 Dane's Dig. 598, Sec. 11.—11 Mod 161.—6 Mod. 68.—8 Mod. 144.—1 Wils. 320.—*Holbrook* vs. *Holbrook et al.* 18 Mass. R. 258.—Big. Dig. 740, Sec. 9. For the notion, that plaintiff is required to prove that defendant had heard of the suit, is such as would enable him to have appeared and had a trial. Hence it appears from this part of the section, that an opportunity for trial, is what is intended, which must be held to control and fix the meaning of the former words, which will be giving a reasonable and suitable construction to the whole enactment agreeably to the intent of the Legislature, which is the grand fundamental rule of construction.—Big. Dig. 739, F. Sec. 1.—3 Massachnsetts Reports, 540.—*Richards* vs. *Daggett et al.*, 4 do., 534.—*Pease* vs. *Whitney et al.*, 5 do., 380.—*Stanwood* vs. *Peirce*, 7 do., 458.—*Bond* vs. *Appleton*, 8 do., 472.—*Gibson* vs. *Jenney*, 15 do., 205.— 1 Con. R. 167, *Brown* vs. *Barry*. And also agreeable to the rule, that it is always to be presumed the Legislature intended the most reasonable and beneficial construction of their acts.—Big. Dig. 739, Sec. 2.—*Richards* vs. *Daggett*, 4 Mass. R. 537.—*Inhabitants of Somerset* vs. *Inhabitants of Dighton*, 12 do., 383.

4th, Because, to adopt a different construction, would deprive the party of every possible remedy, inasmuch as a sentence, judgement, or decree of a Justice, within his jurisdiction, cannot be re-examined or reviewed, save by appeal, *Audita Querela*, petition under the act of 1829, and writ of review. An appeal could not be taken, because defendant had no day in court. *Audita Querela* stands on the same ground as the the present suit, as regards the present question. If it be necessary that defendant be out of the State, at the time the original suit is commenced, to enable him to sustain his writ of review, it is no less so to

enable him to maintain his *Audita*. In this respect, they are on the same footing; and so treated by this court in the case of *Marvin* vs. *Wilkins*, 1 Aik. Rep. 107. And we have before seen, that an *Audita Querela* is only proper, when the party is either in danger of, or actally in execution.—3 Bl Com. 405.—1 Aik. R. 323, *Staniford* vs. *Barry*. The act of 1829, in many cases will prove unavailing, because the petition can only be preferred to the first and second County Court, after the rendition of judgement by the Justice: therefore, inasmuch as defendant, in many cases, would not come to the knowledge of the existence of the judgement, until the time for applying for relief had elapsed, this cannot be an adequate remedy.—Acts of 1829, p. 1, Sec. 2. But in determining the present case, this act cannot have the most remote bearing against us; for the judgement, of which we complain, was rendered 9th August, 1828, a year or more antecedent to the passing of the act. A writ of review then, it would seem, is the only possible remedy.

5th, Because, plaintiff in the original action, understood this case to come within the act in question, and has thus treated it, by procuring a continuance in the first instance, and then entering into a recognizance, agreeably thereto, thus admitting of record the correctness of our positions, which it is deemed incompetent for him now to question.

6th, Because, the construction here contended for, has already been given to this section of the statute, by this court, in the case above cited, of *Marvin* vs. *Wilkins*. Therefore, it is contended that defendant has tendered an issue on an immaterial fact, without answering the material allegations in the writ; and inasmuch as a demurrer is a sufficient answer to an insufficient plea, we are entitled to judgement.

L. Marsh, contra.—A writ of review is a special action given by statute, and cannot be sustained, unless the case comes clearly within its provisions.

1st. The requirements of the statute are, that it should appear to the satisfaction of the Justice that the defendant was out of the State at the time of the commencement of the suit, and had no notice thereof; and that the Justice

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caused the action to be continued, &c.—See Statute, page 129, Section 18.

No writ of review lies, except where it is expressly given by statute.—1 Aik. Rep. 110. The declaration in such case should show all the facts necessary to bring the case within the provisions of the statute, as all those are essential to the plaintiff's right of recovery.—1 Swift's Dig. 598.—1 Ch. Pl. 218.—1 Saund. Pl. 415.

2d. This case is analogous to actions on statutes, where every fact, necessary to bring the case within the provisions of the statute, must be alleged and proved.—1 Ch. Pl. 359.—5 Mass. Rep. 270.—13 John. Rep. 428 & 468.—5 Com. Dig. Pl. c. 76, p. 360.—2 Saund. Pl. 830. The declaration should show that the cause of action was within the jurisdiction of the justice, being a *special action* in an *inferior* Court.—1 Term Rep. 151.—1 Aik. Rep. 302, *Hubbard et al.* vs. *Davis et al.*—1 Ch. Pl. 279 & 280.—Cowen's Dig. 428–9, No. 112 to 116 inclusive; also, No. 121 & 122.—1 N. Y. Dig. p. 2, No. 11, & p. 3, No. 27.

3d. Under this view of the case, it was necessary for the present plaintiff to allege that he was out of the State, and that he had no notice of the first suit; for these facts were material, and the plaintiff could not sustain his suit without the allegation and proof of both; of course a denial of either of those facts was a sufficient answer to the declaration.—6 Dane, 190.—2 Saund. Pl. 777, *et seq.*—5 Com. Dig. Pl. G. 11, p. 456.—1 Ch. Pl. 602.—1 Sw. Dig. 624: And a conclusion to the country was proper.—1 Ch. Pl. 536 & 607.—2 Saund. Pl. 778.—Big. Dig. 584.—5 Com. Dig. 414, E. 32.—1 Sw. Dig. 634.

4th. The allegation that Davis was out of the State, is an affirmative one, and should be proved by him.—1 Saund. Pl. 490.

5th. The case of *Marvin* vs. *Wilkins*, 1 Aik. Rep. 107, does not show that the traverse in *this case* is immaterial. The *gist* of the action was, that the complainant never had his day in Court; and the allegation of starting for the State of New-York, was made for the purpose of showing that he was *constructively* out of the State, and consequently, that he could not have had notice of the suit, and his day in Court. The complaint in an action of *Audita Que-*

rela, is that the complainant has not had his day in Court, and that he is in execution, or in danger of one wrongfully obtained, or wrongfully levied after the judgement upon which it issued had been set aside or released.—*Staniford* vs. *Barry*, 1 Aik. Rep. 321.—*Eddy* vs. *Cochran*, same, 359. But in the present case, no facts are alleged tending to show that by any *construction* Davis was out of the State, but a direct allegation of the fact. This assertion is denied by Beebe, and by the demurrer admitted to be *untrue*, but said to be *immaterial*. It is believed to be past a doubt that if Davis was not either *actually* or *constructively* out of the State, his present action cannot be sustained. Whether Davis has any remedy, may be questionable; as he was within the State, and had legal notice of the suit, though personal notice was not proved. However that may be, it is sufficient at present to show that this case is not provided for by the 8th Section of the justices' act.

6th. It is argued that Beebe has treated this case as coming within the statute, by entering bonds, &c., and ought not now to dispute the assertion. But it is a sufficient answer, that the misapprehension of the plaintiff in that suit, as to law or fact, could not bring the case within the 18th Section, which was not there before; as the bonds, &c. are mere surplusage and useless ceremony.—Besides, the plaintiff in that suit had a right to take measures to protect himself from an *Audita Querela*, if it should afterwards appear that the defendant was out of the State, and had no notice of the suit, without having those precautions adduced as proof that Davis was out of the State, when that fact never was admitted on the justice's records.

The opinion of the Court was pronounced by

WILLIAMS, J.—This cause came before us on a demurrer to the defendant's plea. A writ of review must set forth the fact on which the party relies, as a ground for the relief asked for. It does not at once bring forward the original action, as has been argued; but it may be met by a plea or demurrer as other writs. The Statute of Limitations may be plead to the writ, and though the defences which may be set up are not many, still the facts which constitute a defence, and which afford sufficient reason

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why the review should not be granted, may be plead in bar to the writ. The statute contemplates a trial, or at any rate that there may be a recovery on the writ and damages awarded if the execution or any part is collected. A recognizance is taken before issuing execution on the judgment on which a review may be asked for, to refund and pay back what may be recovered on the writ of review. The question before us is, whether the plea of the defendant in this suit, is such as he may interpose to avoid the review.

It has been laid down in the case of *Marvin* vs. *Wilkins*, 1 Aik. 107, and it is a correct proposition, that no review can be allowed except in cases where it is given by statute. But inasmuch as this writ is given for the purpose of relieving one, against whom a judgement is rendered in his absence from the State, and who has no notice of the suit, and as it is contrary to the very first principles which obtain in relation to proceedings in courts of justice, and in relation to judgements, that any judgement shall be valid, rendered against a man who has no notice or knowledge of any proceedings against him, and as the object of the writ is simply to obtain a trial of the matter in controversy between the parties, when no trial has been had; the statute in question ought to receive a liberal construction, so as to advance the remedy given therein.

The plea in this case denies the fact that Davis was out of the State at the time the judgement against him in favor of Beebe was rendered: this leaves the other fact admitted, to wit, that he had no notice of the suit.

When a judgement has been rendered by a Justice of the Peace against a man who was out of the State at the time, and had no notice, and where no continuance was granted by the Justice, or recognizance taken of the creditor for refunding in case a writ of review should be brought, it has been determined by this Court, in the case of *Marvin* vs. *Wilkins*, above referred to, that an *Audita Querela* is the appropriate remedy for the person against whom the judgement was rendered; but when the cause was continued, and the recognizance taken, the remedy must be by writ of review.

The enquiry then must be, whether, when a plaintiff

procures a cause to be continued for the purpose of giving notice to a defendant, and further on obtaining a judgement after such continuance, enters into a recognizance to refund and pay back what may be recovered on a writ of review, he is at liberty, when such writ is brought, to treat this as an unnecessary and unmeaning procedure, and contend that his judgement was obtained against a person residing in the State, and having notice of the process.

Now it is conceded, that upon the fact admitted by the demurrer, viz. that Davis had no notice of the process on which the judgement was rendered, that he has a remedy; but it is contended that it should have been by writ of *Audita Querela*. It appears to us however, that if he had brought such a writ, he would have been told that he had mistaken his remedy, and that he should have brought a writ of review; that the judgement was taken against him, on the supposition that he was out of the State, and had no notice of the suit; and the appropriate security was given by way of recognizance, that the judgement should not prejudice him if it ought not to have been rendered, as was rendered, for too large a sum, and to ensure him a trial on the merits if he wished for it.

In this case, the records of the Justice before whom the original judgement was randered, are not a part of the pleadings, and must therefore be taken to be as they are set out in the writ. From this it appears that the suit was commenced by Beebe against Davis, returnable the 23d day of August, 1828; that at the return day, the cause was called, and the defendant not appearing, it was continued until the 25th day of the same August, on which day a judgement was rendered by default.—That execution did not issue until the 6th September, 1828, previous to which the attorney for the plaintiff entered into a recognizance agreeably to the statute in that behalf.

These are the proceedings to be had, when it appears to a Justice, before whom a suit is brought, that the defendant was out of the State at the time of commencing the suit, and at the time therein set for trial; and was so remote from the place of trial, at the time to which it was continued,that he could not probably have had notice of the

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suit. It is true that it is not said in words that it appeared to the Justice that the defendant was out of the State; but it is said the cause was continued for notice to the defendant. As the writ was regularly served, and such notice was given, as gave the Justice jurisdiction of the parties, this continuance for notice is equivalent to saying that the defendant had not before had actual notice of the suit; and taken in connexion with the after proceedings, the legal inference therefrom is, that it appeared to the Justice that defendant was out of the State. The result to which we have arrived is, that the proceedings before the Justice is equivalent to a legal adjudication in that suit; that the defendant therein was out of the State, and is not afterwards to be put in issue by a denial of that fact.—That when a plaintiff and Justice have both proceeded on the ground that a defendant was out of the State, and continued the cause, and the requisite security has been entered into for ensuring a trial on the merits, and refunding what may be recovered by writ of review, the plaintiff is not at liberty when such writ is brought as a defence thereto, to select either of these facts, to wit, the absence of the defendant from the State at the commencement of the suit and return of the writ, or his not having notice of the suit and deny them by a plea.—That having made it appear to the satisfaction of the Justice that a defendant was out of the State at the time of commencing a suit, (which it must be taken for granted was done, or the Justice would not have continued the cause for notice and taken the recognizance) he must consider that as a fact not to be disputed in any after proceedings.

The judgement of the County Court is therefore reversed, and judgement must be entered that the plea of the defendant is insufficient, and that the review is allowed.

The cause will be remanded to the County Court for trial of the original action. And whatever the damages the plaintiff Davis, may recover, will be entered as damages in this suit.

BAYLIES, J., *dissenting*.

LUTHER PENNIMAN, *Qui Tam.* *vs.* CHARLES ROBINSON.

WASHINGTON, *March*, 1826.

Penniman *vs.* Robinson.

That a complaint before a Justice of the Peace, founded on the 3d Section of the Statute of 1807, entitled, "An Act to punish undue speculations," &c. in case of conviction, is appealable.

This was a complaint before a Justice of the Peace, for taking more fees in a suit upon a negotiable note, assigned for the purpose of collection merely, than would have been recoverable if the action had been commenced in the name of the payee; and was founded upon the 3d Section of the Statute of 1807, page 147.

The complainant recovered the penalty of twenty dollars, before the Justice, and the defendant appealed to the County Court; and there the plaintiff filed a motion to dismiss the appeal, contending that no appeal was allowed by the statute. The County Court overruled this motion, and the complainant excepted to this decision. This is the only point in the case, the report of which can be of any essential use to the profession. There was a special demurrer to the complaint; the arguments and decision upon which, formed the chief labor in the case. The Court, with no little difficulty, sustained the complaint. After which, the defendant was permitted to withdraw the demurrer, and plead the General Issue, on payment of costs; and the cause has gone to the County Court for a jury trial.

Argument for the complainant.—The third Section of the Act (Comp. Stat. 147, No. 3) on which this information is founded, provides, that the penalty "shall be recovered in the same manner as in and by the first Section of this Act is provided." The first Section gives a penalty of $33 for the commission of any of the offences therein enumerated; and enacts that that sum "shall be recovered by complaint or information, before any Justice of the Peace in the County where such offence shall be committed."

The fifth Section of the same Act declares, "That, in all cases, which, in and by the first Section of this Act, are made cognizable before any Justice of the Peace, no appeal shall be had or allowed," &c. Now, the fair reading of this statute is, that this action is made cognizable before a magistrate by the first Section; and it is equally apparent,

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that the Legislature never intended, that an appeal should be had in cases arising under the third Section; for the wording in the fifth Section, is not, that, in all cases arising under the first Section, no appeal shall be allowed, "*made cognizable before a Justice of the Peace.*" If an appeal is allowed, then this statute presents this singular anomaly, that, by one section, a penalty of $33 is given, and the decision of the magistrate is final in that case; and, by another section of the same statute, a penalty of $20 for another offence is given, and of which, a Justice of the Peace has also jurisdiction, and from his decision an appeal *may* be had: or, in other words, to place the absurdity of the construction, put upon the act by the defendant's counsel, in a stronger light, a defendant may have an appeal, when the judgement against him is for *twenty dollars*, but if it is for *thirty-three dollars*, then he cannot be allowed an appeal.

Again, we submit, as we have already remarked, that jurisdiction of this action is expressly given to the magistrate by the first Section of the Act; and, that all his authority to hear and determine the cause was derived from that section. Thûs, if a statute be temporary and limited to a given number of years, and, before the expiration of the time, it be continued by another act, all acts, civil and criminal, are to be charged under the authority of the first act.—Cro. Eliz. 750.—Strange, 1066.—4 Term Rep. 109.—1 Kent's Com. 435–6.

If we are correct in this position, it is perfectly clear, that the County Court had no jurisdiction, and the action must be dismissed.

The defendant's counsel urged, That the appeal was correctly allowed, and the action regularly before the County Court, and that Court correctly refused to dismiss the appeal.

The fifth section of the statute only takes away the right of appeal in cases made cognizable before a Justice of the Peace, in and by the first section of the act. This case is not made cognizable before a Justice by the first section; but by the third; or, at most, by the first and third sections jointly.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—Upon the first view of this case, it appeared not very clear, whether the case was appealable or not. We examined the later statute of 1831, and find its appealing power so expressed as not to effect this case. On a careful reading of the third section, on which this complaint is founded, and supplying the reference, our difficulty is removed. This third section defines the offence, and inflicts the penalty of twenty dollars; and then adds, "to be recovered in the same manner as in and by the first section of this act is provided." If we supply this reference, and read the third section by itself, it will read as follows. "He shall forfeit and pay the sum of twenty dollars; one half &c. to be recovered by complaint or information, before any Justice of the Peace in the County, where such offence shall be committed." This shows, that the third section gives jurisdiction to a Justice of the Peace. Hence it follows, that the fifth section, taking away the right of appeal in those cases, made cognizable by the first section, does not affect this case; but leaves cases within the third section, as well as those within the fourth, subject to appeal, by virtue of the general statutes, regulating appeals from decisions of Justices of the Peace.

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The judgement of the County Court, so far as relates to their sustaining the appeal to that Court, is affirmed.

Smith & Peck, for complainant.
Upham & Keith, for defendant.

The Town of MONTPELIER *vs.* The Town of CALAIS.

WASHINGTON, *March*, 1833.

That a man's receiving aid, while a prisoner, from the town where the prison is located, on a previous pledge of sufficient personal property to secure a remuneration, does not prevent his gaining a settlement by seven years residence in the town from which he is brought to prison.

This cause came up from the County Court on the exceptions, filed to the decisions of the County Court, on trial. The bill of exceptions, allowed by said County Court was as follows, to wit:

This was an action of *assumpsit* for money paid in the

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support of one Stoddard, a pauper—as by the declaration, which is referred to. Plea, the General Issue—and trial by jury.

It was agreed by the parties, on trial, that, in 1832, Stoddard had his legal settlement in Montpelier, and, that he still retained it there, unless he had subsequently acquired a settlement in Calais. It was further agreed, that, for more than seven years before the expenses were incurred, for which the action was brought, Stoddard had resided in Calais, and, that the money sued for was properly expended by the plaintiffs in the support of Stoddard, while confined in the County Jail in Montpelier in October A. D. 1831: he having been brought from Calais and committed to said prison. It was also admitted, that a proper demand in writing was made on the defendants more than fifteen days before the commencement of the action.

In order to obviate the effect of said residence in Calais, the defendants undertook to show, that, before the expiration of said seven years residence, said Stoddard was committed to said prison upon another occasion, and, that the plaintiffs then assisted and relieved him as a pauper. For this purpose the defendants called as witnesses, Mr. Dewey, Daniel Baldwin, and Timothy Hubbard.

Mr. Dewey testified, that, during the first confinement of Stoddard in the jail aforesaid, which was in January and February 1830, the witness was jailer; that Stoddard informed him, he was poor and unable to support himself in jail; that the witness thereupon applied to said Timothy Hubbard, overseer of the poor in Montpelier, to make provision for the support of said Stoddard; that Stoddard took the poor debtor's oath on the 1st day of February, A. D. 1830, but was not then liberated, because his expenses in jail and the fees of the Jail Commissioners remained unpaid; and that, within a few days thereafter, the said Timothy Hubbard drew an order on the said Baldwin, town treasurer, in favor of the witness, for his claim for the board of said Stoddard, who was thereupon liberated from prison.

Timothy Hubbard testified, that he did not attend to the first application, made by Dewey—nor until after Stoddard had taken the poor debtor's oath;—that, upon a

second application by said Dewey, the witness did attend to the subject—that he refused any relief or interferance, except on condition that Stoddard would first make over to him his tools, then in Calais, as a security for the repayment of what the witness might expend for him; that Stoddard accordingly made a written pledge to witness of his tools aforesaid for the purpose aforesaid, and the witness thereupon drew the order aforesaid in favor of Dewey, and paid to the Jail Commissioners their fees, and charged the same to the town of Montpelier;—that the witness never had actual possession of the tools, but had a right to take them when he pleased;—that, after a while, Stoddard brought to the witness a note against one Ormsbee, for a sum more than sufficient to cover all the expenses, which the witness had assumed for said Stoddard, and wished to exchange it for said pledge of tools, to which witness assented;—that the witness lodged said note with said Baldwin; and that, from the avails of said note, the town of Montpelier was fully indemnified for all expenditures for said Stoddard.

Daniel Baldwin testified, that, as town treasurer, he received and paid the order aforesaid, in favor of Dewey, and charged the same to the town, in his accounts as treasurer;—that he also received of said Hubbard the note aforesaid against Ormsbee, with notice of its being pledged for the purpose aforesaid;—that he received payment of said note from Ormsbee, being about $4,50, and gave credit to the town therefor, and paid over to Stoddard a small balance of the avails of said note, about the 2d day of March 1831;—and that he believed his account as treasurer, including the items of charge and credit aforesaid, were posted and settled with the town in the usual manner.

This was all the evidence; and the defendants insisted and urged the Court to charge the jury, that, from their showing, they were entitled to a verdict; but the Court charged that, upon the aforesaid evidence, if believed, the jury ought to return a verdict for the plaintiffs. Verdict and judgement for the plaintiff. And to the charge aforesaid the defendants except. Exceptions allowed, and the case ordered to the Supreme Court.

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Argument in support of exceptions.—It is admitted, that the settlement of the pauper is in Montpelier, unless he has acquired a settlement in Calais, by his residence there for seven year subsequent to 1823, under the 8th clause of the 1st section of the act of 1817. That clause declares, that "any person, having a settlement in any town in this state, and of full age, who shall hereafter reside in any other town in this state, for the term of seven years, and, during said term, maintain himself, or herself and family *and not become chargeable to either of said towns*, shall be adjudged to gain a settlement in the town in which he or she may so reside." 1 Comp. Stat. p. 382.

It appears, that, before the expiration of the seven years residence in Calais, the pauper was committed to prison in the County jail in Montpelier, on a civil process, and, being poor and unable to support himself in jail, application was made by him, through the jailor, to the overseer of the poor of Montpelier, for provision for his support, and the overseer drew an order in favor of the jailor on the town treasurer, for the expense of the pauper's board, and paid the Jail Commissioner's fees and charged the same to the town. The town treasurer received and paid the order, and charged the amount to the town in his account, as treasurer, and the same was settled with the town in the usual manner. These facts are decisive, that the pauper did become *chargeable* to the town of Montpelier during his seven years residence in Calais, and, of themselves, take the case out of the clause of the statute referred to.—The town of Montpelier, after its overseer, on a formal application made to him in behalf of the pauper has, in his official character, acted upon the application, and furnished relief, and his act has been sanctioned by the town by an allowance of the account, cannot be permitted to say that the pauper has not become *chargeable* to the town.—The word *chargeable*, means a *charge in fact*, and a person who applies for, and obtains relief, from the town, is necessarily *chargeable* to the town, and no one can acquire a settlement under the statute, by a residence of seven years, unless he has maintained himself without receiving relief or support from the town. 13 Mass. 460; 5 Con. 384.

The fact, that the pauper, at the time the relief was af-

forded him, made and signed to the overseer of Montpelier, a written pledge of the tools of his trade, as security for the repayment of the expenses incurred for him by the town, and the repayment afterwards, by the pauper to the town, of the account of the expenses, cannot alter the case.

There was no delivery of the tools, and it is essential to every pledge of a personal chattle, that it should be accompanied by delivery of possession, or it will not be valid. 2 Aik. Rep. 111. The pledge, therefore, was a nulity, of no effect in law. It is evident, then, that, before the note was given, the pauper was *chargeable* to Montpelier, for Montpelier could have obtained no indemnification from the pledge.

But the pretended security was wholly unavailable on other grounds. The pauper's settlement, at the time the expenses were incurred, was in Montpelier; and he was utterly destitute of property, except, perhaps, a little household furniture, and a few tools of his trade. The provision, made by law for the relief of the poor, is a charitable provision.

The town, where a person is settled, is under a legal obligation to provide for him, when in indigent circumstances and in need of assistance; and it would seem, that any promise or contract, obtained from him to reimburse the expenses, on condition of relief being furnished him, must be void. It is clear, that monies expended for the support of a pauper could not be recovered of the pauper; and if the law will not imply a promise to repay the expenses incurred, an express promise, extorted at the time, can not be enforced. It was oppression, and a violation of duty to take advantage of the pauper's necessities, and extort from him a pledge of the tools of his trade. If such a transaction is legal, then overseers may, in any case, strip the paupers family of every article of household furniture necessary for their use, on condition of furnishing relief; or may take the paupers note for the expenses, and send him immediately to prison. If the pauper's settlement had not been in Montpelier, but in some other town, no pledge of security would have been extorted from him; but such town would have been called upon and obliged to reim-

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burse the expenses, on the ground, that the pauper had been *chargeable* to Montpelier.

But, assuming the security taken to be valid, or, that a town always has a right of action against the pauper for an indemnity for the support furnished him, yet it was uncertain, whether the security would ever be rendered available; or the town be indemnified by a delivery of the tools, or repayment of the expenses. Indeed, the security to reimburse the expenses necessarily supposes the pauper to have become *chargeable*, and the after reimbursement of the expenses, whether obtained on the security taken, or otherwise, does not negate, but affirm the fact, that he had become *chargeable*. Having applied as a pauper for assistance, and received relief from the overseer of Montpelier, he became actually *chargeable* to the town, and it is altogether immaterial, whether the expenses, incurred, were afterwards repaid to the town, or not. Burr. Sett. Cases, p. 5, 415, 488, 522; 20 Com. L. Rep. 351; 5 Conn. 384. The Legislature have enacted a positive rule, by which this question is to be decided; and it is laid down, that, in all questions relative to settlements, it is the safest and wisest way to adhere to the letter of the law. 1 T. Rep. 558. The rule, although arbitrarily assumed, is to be strictly observed, and, as was said by an eminent judge in a similar case, "we must not render the rule uncertain, or the line of discrimination given by it variable or shifting, by yielding to arguments of expediency, or by reasoning upon the general purposes of the rule."

Counsel for the plaintiff.—This question will be easily solved, when the precise meaning of the phrases "*maintain himself*" &c. and "*not become chargeable,*" is ascertained.—The two expressions mean one and the same thing. If a person maintains himself, he does not become chargeable to any one, and if he does not become chargeable to any one, he maintains himself. The person who pays for all he receives maintains himself.

The meaning of the *term* "chargeable" is *expensive costly*. The statute, therefore, must be construed the same as if it had said, become *expensive*, &c.

It will be noticed, that, in this case, the application to

the overseer was made by the jailor; that the overseer refused the aid required. He did not admit, that the prisoner was chargeable to the town of Montpelier. Upon a second application, however, he consented to pay the sum required for the liberation of the prisoner. But this was done in pursuance of a *contract*, by which contract he received an *indemnity*, and that security proved *more than sufficient*.

In this case, therefore, there was no legal obligation upon the town of Montpelier; for Stoddard was abundantly able to pay, himself.

The statute means legally chargeable.

Can it, with propriety, be said, that a person has become chargeable to a town, until the town has *incurred expense in support of such person*.

There was no legal liability on the town of Montpelier. For the event proves, that Stoddard was of sufficient ability to support himself. And the conduct, as well as the language, of the overseer, repels the idea, that he considered the town liable, or that he intended to assist in any greater extent, than the secury it received.

And does the fact, that the town paid the money in the first instance, vary the case?

Does the *guest* become chargeable to the landlord, because the latter pays for the meat and drink of the former?

In the case of *Londonderry* vs. *Acton*, 3 Vt. Rep. 132, it was said, no person can be chargeable while he "has the means of supporting himself." When a "person has property, whether real or personal, he must expend that in his own support, before he can make an effectual or legal call upon the overseers of the poor for relief."

In Brayton, 175, it was decided, that "a person, brought from one town and confined in jail in another, is a transient person.

Sec. 11 of statute, p. 373, makes it the duty of the towns to support *poor strangers*, suddenly taken sick, &c. and declares, "*that if such person be not of sufficient ability to defray the expense*, the town may recover of the town in which such stranger was legally settled, &c.

The present case, then, stands exactly upon the same footing as the case of a stranger, passing through a town,

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and for some cause, happening to be destitute of money, and requiring the assistance for which provision is made. Now, in cases of this description, towns are obliged to furnish assistance without any inquiry respecting the ability of the stranger. Now, suppose, the stranger to be worth an independent fortune, and, after he has recovered, amply indemnifies the town. Would it not be an abuse of language to say, that this stranger had been chargeable to said town?

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—It is agreed that Stoddard once had his legal settlement in Montpelier; and the only question, now to be decided, is, did Stoddard in such a sense receive support from Montpelier, during his seven years residence in Calais, as to prevent his gaining a legal settlement in the latter place? The present action is brought to recover the expenses, to which the town of Montpelier was subjected, for the support of Stoddard, a pauper, while imprisoned in the County jail in Montpelier, since he had resided seven years in Calais. If he became chargeable to either town, in the sense of the statute, before the seven years had expired, he gained no settlemcnt in Calais.

With regard to the assistance furnished during the first imprisonment of Stoddard, which was before the seven years expired, it seems, that the jailer called upon Hubbard, the overseer of the poor of Montpelier, and requested aid for Stoddard, who had before told the jailer of his poverty. Hubbard gave no heed to this call. Afterwards, and after Stoddard had sworn out of jail, he was again applied to for assistance, and refused to interfere, till Stoddard gave him a bill of sale of his tools, that were at Calais; which were afterwards redeemed by a note against a third person, which proved sufficient to reimburse the expenditure made by Hubbard, and left a balance to be paid back to Stoddard. If Hubbard as overseer, on this occasion, had furnished the little aid of four or five dollars, as an expenditure of the Town's money, there could be no doubt but that Stoddard would have retained his former settlement in Montpelier. On the other hand, if Hubbard had furnished this money from his own funds, on receiving the pledge of tools, there could have

been no pretence, that this would prevent his gaining a settlement in Calais. Whatever difficulty there is, results from the money's being drawn from the town treasury. But this, upon full concideration, seems to be but the lending of the town's money to the pauper on a pledge of his own property or security. Stoddard, in as literal and emphatical a sense, procured this support for himself, as if he had procured it from any other source, upon pledge of the same property.

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The question is not, who handled the money for his relief ? but who bore the burden of this relief? Stoddard clearly bore this, himself. He not only paid the money in the end; but he kept the town all the time safe from loss.

If the town had furnished this assistance upon their own responsibility, and wholly at their own risk, probably, their being indemnified by an after payment, might not have varied the case, according to the case cited from Connecticut. Yet we must not forget, that the eleventh section of the statute, which regulates the giving aid by towns to transient person, gives a remedy against the town, where the person relieved belongs, only in the event of such person's being unable to respond.

This section prescribes the remedy to be general *assumpsit* for monies laid out and expended. Were it not for this, I think the town suing, in such a case, would need to aver in their declaration, that the person relieved was unable to respond.

We consider the charge of the County Court correct, authorizing a verdict for the plaintiff, and their

Judgement is affirmed.

Merrill & Spaulding, for plaintiffs.
Samuel B. Prentiss for defendants.

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R. & R. RICHARDSON JR. *vs.* ROYALTON & WOODSTOCK TURNPIKE COMPANY.

If the plaintiffs make an averment in their declaration, which is necessary to be proved; the defendants have a right to disprove it, with suitable evidence.

Where the charter of a turnpike company makes them liable to pay all damages, which may happen to any person from neglect of any bridge, the company is not liable for damages, if they build and constantly maintain a bridge of sufficient strength for all ordinary purposes, and the same is broken down, and private damages sustained by carelessly over loading the bridge with cattle.

The company is not liable for accident.

This was an action commenced to the County Court counting upon the neglect of the defendants in maintaining and keeping in repair a bridge upon their road, over White River, whereby, the plaintiffs in driving cattle to Boston were damnified; said bridge having broke under the weight of said cattle, and two of them killed and others damaged by being precipitated into the stream. The issue being duly joined, the plaintiffs adduced evidence tending to prove that in November A. D. 1831, they, in company with one or two other individuals were passing through the town of Royalton in Windsor County, with a drove of fat cattle for the Boston Market, consisting of about ninety head, principally oxen and cows—that in passing the defendant's bridge across White River in Royalton, with said drove of cattle, the same, when said cattle were upon it, fell and precipitated eighteen or twenty head of cattle into the river below; that one or two of the cattle were killed, and some others badly injured. The plaintiffs gave further evidence tending to prove that said bridge was in a dilapidated state, and that some of the timbers composing the same were rotten. The plaintiffs gave in evidence also, the act of the Legislature incorporating the defendants, which is referred to as part of this case.

The defendants in support of the issue on their part offered evidence tending to prove that said bridge was, about three years before the injury complained of happened, built new, and that no part of said bridge had decayed; that the timber in said bridge was all sound at the time it fell with the plaintiff's cattle. And further, that said bridge was in the opinions of their witnesses, constructed in a good

workmanlike manner, and with strong timber of suitable size for such a bridge, and that it was sufficient and safe for travellers to pass with their carriages and loaded teams of the largest size used in the country. To the admission of all the evidence offered by the defendants as aforesaid the counsel for plaintiffs objected, and the same was excluded by the court. To which decision the defendants excepted. The defendants in further support of said issue on their part introduced evidence tending to prove that said drove of ninety head of cattle were all driven on the said bridge without separating the drove; that the southern reach of said bridge fell, and that it was covered with cattle when it fell; that eighteen or twenty head of cattle fell with the bridge into the river below. That said bridge fell in consequence of the breaking of the string pieces by the weight of cattle upon them.

The counsel for the defendants requested the Court to charge the jury,

1st. That the defendants are bound to build and keep in repair bridges sufficient and safe for persons to pass with their carriages and loaded teams of the largest kind used in the county; and that the defendants are not liable in this action, if the jury find that the bridge, at the time it fell with the plaintiffs' cattle, was sufficient and safe for loaded teams of the largest kind used in the country to pass.

2d. It was the duty of the plaintiffs to have seperated their drove of cattle and driven only a part of them over the bridge at a time.

3d. That if the plaintiffs drove all the cattle on this bridge at once and broke it down, they cannot recover in this action because the injury was occasioned by their own carelessness.

But the Court refused so to charge the jury, but did charge them on this point: That the defendants were to a certain extent insurers of the sufficiency of their bridges, that is to say, they were responsible that their bridges should be of sufficient strength to support any weight which might be reasonably expected in the ordinary course of business to be transported on them by those who pass on the road and paid toll at their gates. That as the defendants were

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authorized to receive, and did receive toll for cattle in droves, they were resposible that their bridges should be sufficient to sustain any number of cattle which it is usual and customary to drive in one drove, in passing the bridge in the usual manner. That the drove in question was not, in the opinion of the Court, so unusually or unreasonably large as to vary the liability of the defendants; and that the plaintiffs were not legally bound to separate their drove for the purpose of passing the bridge. To this charge the defendants, also excepted. The several exceptions were allowed, and the case ordered to the Supreme Court for further consideration.

Upham & Keith, for defendants.—1. The evidence offered by the defendants, in support of the issue on their part, was improperly excluded by the Court below.

Upon the trial of this cause in the County Court, the plaintiffs introduced evidence tending to prove that the bridge which fell with the plaintiffs' cattle, was in a dilapidated state, and unsafe for persons to pass with teams, carriages, &c.

To rebut this evidence, and to support the issue on their part, the defendants offered to prove, *first*, That the bridge was built about two years before the injury complained of happened: That it was constructed with great care and caution: That the timber with which it was constructed, was sound, strong, and of a proper size for such a bridge. *Second*, That at the time the bridge fell with the plaintiffs' cattle, it was in good repair, and sufficient to sustain the heaviest loaded teams that usually pass through the country. *Third*, That the five string-pieces which broke and fell with the cattle, were perfectly sound. *Fourth*, That the injury was occasioned by the carelessness of the plaintiffs in driving an unreasonable number of their cattle on to the bridge at once.

To the admission of this evidence, the plaintiffs objected; and it was excluded by the County Court.

The first question presented is, was this evidence properly excluded? We maintain that it was not. Turnpike corporations, like towns, we admit, are answerable for any special damage which shall happen to any person or per-

sons, his or their teams or carriages, by means of any insufficiency or want of repair in their roads and bridges.

We insist, however, that the legal measure of duty as to the sufficiency of bridges, is, that they should be sufficient and safe for loaded teams of the largest kind used in the country. To go further, and require bridges sufficient to sustain buildings, when drawn over them, and whole droves of cattle, would be both unreasonable and unjust.

In the construction and preservation of roads and bridges, the law only requires the exercise of ordinary care and diligence.

In *Townsend* vs. *The Susquehannah Turnpike Company*, it was holden that the defendants were bound to bestow ordinary care and diligence in the construction of their bridges, and keeping them in repair, but are not responsible for accidents which do not arise from their neglect, or want of such ordinary care and skill.—6 John. Rep. 90.

If the defendants are liable at all in this action, it is upon the ground of *negligence*; and this negligence may consist in want of care in constructing the bridge, or in omitting to make necessary repairs.—*Vide* Charter of Co.—Laws of 1800, p. 60-—6 John. Rep. 90.—1 Swift. Dig. 552.—*Noyes* vs. *Morristown*, 1 Vt. Rep. 353.

The plaintiffs therefore, were bound to prove that the injury complained of was occasioned by the *negligence* of the defendants, and without any fault on their part. For it cannot be presumed that the Legislature intended to provide a remedy for damages sustained by any man through his own wrong.—*Vide* 4 Mass. R. 422.—11 East. R. 60.—2 N. H. R. 392.—6 Aik. R. 74.—7 Pick. 188.—7 Con. R. 86.—15 John. R. 250.—1 Mass. R. 153.

If we are correct in our views of the law, which should govern this case, the evidence offered by the defendants was certainly admissible.

2. The idea that towns and turnpike corporations are insurers, is certainly *new*, and we think unsupported by reason or authority.

Insurance is defined to be a contract, whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils and risks to which he is exposed, or against the happening of some e-

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vent. The defendants have received no compensation as insurers, and as such, cannot be made liable in this action.

3. It was not the province of the County Court to decide upon the facts in the case; they should have been submitted to the jury. And for this reason, a new trial should be granted.—*Vide Aylwin* vs. *Ulmer*, 12 Mass. R. 22.—*Tyler* vs. *Ulmer*, Ib. 163.

Instead of excluding the evidence offered by the defendants, it should have been submitted to the jury, and weighed by them: and they should have been instructed by the Court to return a verdict for the defendants, if they found the bridge sufficient to sustain the heaviest loaded teams usually driven through the country.

Whether or not an unreasonable number of cattle were driven on to the bridge at once, was a fact for the jury to find, and it should have been submitted to them under a proper charge from the Court.

4. The jury should have been instructed to return a verdict for the defendants, even if they should find the bridge insufficient to sustain a loaded team of the heaviest kind, provided they should find the weight of cattle upon it, when it fell, greater than that of a loaded team of the largest class usually driven through the country.

P. Dillingham, for plaintiffs.—The only question is, Did the County Court *err* in excluding testimony? We think not. The ground taken by the County Court, if we rightly understand it, is substantially this: That this Company were bound, by law, to maintain, at all times, a bridge *sufficient* to bear over in safety, and without breaking down, all *teams*, *loads*, or *droves of cattle*, which might attempt to pass it, while travelling on the Company's turnpike in the course of doing the ordinary business of the country.

If the County Court did not mistake the law, in *thus deciding*, then the testimony offered by defendants was properly excluded; and, certainly, there was no misapplication of terms—much less was there *error* in saying the Company were insurers, so far as their liability extended to pay damages to those travelling on their road and over their bridges.

A leading consideration with the Legislature, in incorporating every Turnpike Company, must have been, not only that they should keep in repair good roads, but that they should furnish *safe and sufficient bridges*, for every possible case of passing in the transaction of the common business of the country usually requiring travel upon public roads.

The Legislature have not left their *intent* to be *inferred*. In the Act incorporating this Company, it is provided, "That said Company *shall be liable* to pay all damages which may happen to any person, from whom toll is demandable, or any other persons, from *neglect of any bridge*, or want of repairs in said road."—Acts of 1800, page 63, Sec. 5. What is here meant by "*neglect of any bridge?*" A bridge must be a *sufficient* one, or it is "neglected," or in other words, is "*bad and insufficient.*" To what extent must a bridge be sufficient? Can it be *sufficient* reasonably, or within the intent of the Legislature, short of sufficiency to the full extent required by the decision of the County Court? What other rule than this, could be adopted, which would be both reasonable and general? *Can the number of bullocks*—the *weight of any load*, or *the measure of any commodity* passing a bridge in the course of ordinary business, be fixed at any point, so as to form a safe test of the *sufficiency* or *insufficiency* of such bridge?

What other rule then, can this Court adopt, which shall carry into effect the intent of the Legislature—be salutary in its operation—certain in all cases—and of easy application, than *that*, which in this case, and all similar ones, makes the *sufficiency* or *insufficiency* of the bridge, depend upon the *fact*, of whether it stands secure, or breaks down, under any and every load drawn upon it, for the purpose of passing, in transacting any of the usual business of the community? This leaves out cases of unusual and extraordinary business; as well as those, should they ever occur, where there was an obvious and malicious intention to break down a bridge, instead of a *bona fide* one of passing in safety.

A decision by this Court, that fell short of carrying the liability of this Company to the extent laid down by the County Court, would, absolutely, be construing the act in-

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corporating this Company in *restraint of business, of common and ordinary business.* The traveller is *bound* in all cases *to the Company* to pay his toll, in proportion to what he drives; and should this Court decide that the Company's *liability to him* shall cease in case he carries a *heavy load,* they thereby increase his liability a *thousand fold.* For when the Court decides that an individual, while travelling, has been guilty of some act of *imprudence*, which exempts the *Company* from all liability to *him*, it follows as certainly as any effect can follow its cause, that *that* same *imprudent act* makes *him* liable to the Company for the full amount of their loss, arising from that act.—7 Pick. R. 188.

The opinion of the Court was pronounced by

BAYLIES, J.—The 5th Sec. of the Act establishing a corporation by the name of "*The Royalton and Woodstock Turnpike Company,*" among other things says, that the "said corporation shall be liable to pay all damages which may happen to any person from whom toll is demandable, or any other person, *from neglect of any bridge*, or *want of repairs in said road.*"

The plaintiffs, in their declaration, have averred in substance, that on the 5th of November, 1831, the defendants' bridge over White River, on said turnpike road in said Royalton, *from the neglect of the defendants*, had become, and was decayed, rotten, weak, and insuffiicient, so that when the plaintiffs were, then and there, driving their fat cattle to Boston market, on said road across said river upon said bridge, the same broke, gave way, and fell with some of said cattle into said river, and by the fall two of the cattle were killed, and others were greatly bruised and injured, so that the platntiffs suffered two hundred dollars damages to their said cattle from the defendants' neglect of their said bridge, &c.

It was necessary for the plaintiffs to make this *averment* to bring the case within the act; and to prove it on trial.

The plaintiffs gave evidence to the jury tending to prove this *averment;* and when the defendants offered evidence tending to disprove it, the plaintiffs objected, and the Court excluded the evidence. If it was necessary for the plaintiffs to prove their *averment* to support their action,

it was competent for the defendants to disprove it; and no good reason can be assigned, why the Court excluded their evidence.

What *strength* in the defendants' bridge would be sufficient to exonerate them of negligence, so as not to be liable, in case the bridge should be broken down, and private injury sustained, has not, to my knowledge, been decided.

It would *seem* to be the duty of the defendants to build, and constantly maintain bridges of sufficient strength, to bear up the heaviest loads, that usually pass from and to market on their turnpike road: Toll is paid the defendants for the passage of such loads, and the public have a right to require sufficient strength in their bridges to bear them up.

In the case at bar, it is evident that the defendants' bridge was not of sufficient strength to sustain the cattle that were upon it: The bridge broke, and precipitated the cattle into the river. Whether those cattle were considerably heavier than one of the largest loads which usually passed said bridge, drawn by six horses on a large waggon, does not fully appear.—Such load, waggon and horses, would probably weigh eight or ten tons; and if the bridge was safe and sufficient to bear up this weight, the defendants could not be charged with negligence in not building and maintaining a bridge of sufficient strength for all ordinary purposes.

But if the plaintiffs carelessly drove their cattle upon the bridge, in a huddled position, so as to get a greater weight upon the bridge than it could bear, and broke it down, when it was of sufficient strength for all ordinary purposes, the plaintiffs are not entitled to recover damages for injuries which they have suffered by their own folly. The principles which I have advanced receive support from the following *dicta*:

"The defendants are bound to bestow ordinary care and diligence in the construction and preservation of their bridges. They are not responsible for *accidents*, if those *accidents* do not arise from the want of this ordinary care and skill."—6 T. R. 90.

"Where the injury is owing to one's own negligence,

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or want of ordinary care, and he could easily have avoided the obstruction, then no action will lie."—11 East. 61.

The party injured by a defect in a bridge, must be in no fault himself. "For it cannot be presumed, that the act intended to provide a remedy for damages sustained by any man, through his own wrong."—4 Mass. R. 423.

"If from fool-hardiness, one should plunge his horse into water, which by a flood had covered a causeway, he knowing it to be so, or if he should enter upon a bridge, which he saw was weakened by a storm, he ought not to be indemnified for his carelessness."—7 Pick. R. 188.

"Though highways are so low as to be overflowed, towns are not liable for injuries which happen on them, if it was imprudent to pass them in such a condition, or if they were passed unskilfully."—2 N. H. Rep. 392.

In the case at bar, the County Court should have admitted the evidence which was offered by the defendants, and excluded by the Court; and should have instructed the jury according to the foregoing principles of law; but inasmuch as the County Court neglected their duty in these matters,

Their judgement is reversed, and

A new trial granted.

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WILLIS WOOD *vs.* KINSMAN & LAMB.

If a person, who has an exemption from arrest and imprisonment on civil process, be arrested, and imprisoned in violation of his exemption, he should take the first opportunity to assert his privilege, and obtain his liberty; or his negligence will be construed a *waiver* of his privilege; and he cannot afterwards set up his privilege in an action of trespass, so as to make his arrest and imprisonment *unlawful*, that he may recover damages for false imprisonment.

If he be arrested on a writ of attachment, and his exemption be permanent, he should appear at Court, and plead his privilege in abatement of the writ; or if the writ be a summons, he should plead his privilege in bar of an execution against his body. Or, if he be imprisoned on a writ of execution, in the life of it, and according to its precept, and this was done at the request of the creditor, or his attorney, by a proper officer, such execution, if it issued on a regular judgement of a Court of Record, and if it were ever so *erroneous*, and not *absolutely void*, will justify the creditor, or his attorney, for procuring said imprisonment, in an action of trespass for false imprisonment brought against them.

This was an action of *Trespass* for Assault and Battery and False Imprisonment. The defendants plead *not gui*

ty as to the assault and battery; and in justification of the imprisonment, in substance, that the present plaintiff had been arrested by a Sheriff by virtue of an execution in favor of the firm of Center Lamb & Co., by direction of said Lamb to said Kinsman, who acted as the attorney on said execution for the creditors: That said execution was issued upon a regular judgement rendered by a Justice of the Peace, and that this was the imprisonment complained of.

To this plea in bar, the plaintiff replied in substance, that upon the judgement mentioned in said plea, an execution had been issued, upon which the plaintiff had been committed to jail, and had thereupon taken the poor debtors' oath.

To this replication, the defendants rejoined, that the plaintiff was arrested on the attachment, which was followlowed up to the judgement referred to in the pleadings, and held to bail: That he suffered judgement to be rendered by default: That while the execution was in the hands of the Sheriff, he came from the State of New-York, and voluntarily surrendered himself in discharge of bail, and that thereupon he was committed to prison, and took the poor debtors' oath; by reason of all which, he had waived his exemption from arrest and imprisonment upon said judgement.

To this rejoinder the plaintiff demurred; and joinder by defendants.

Upham & Keith, for plaintiff.—This is an action of trespass for assault and battery and false imprisonment, and comes before this Court by appeal from the County Court.

1. The plaintiff insists, that being by statute privileged from arrest and imprisonment, the writ of execution under which the defendants claim to justify, was illegal and void. —Stat. 230.—*Willington* vs. *Stearns*, 1 Pick. Rep. 497.—*Brackett* vs. *Winslow*, 17 Mass. 153 & 8.—*Hammett* vs. *Wyman*, 9 Mass. 138.

2. The writ of execution against the body of the plaintiff being illegal, his proper remedy against the defendants was an action of trespass and false imprisonment.—17 Mass. 153 & 8, *Grumon* vs. *Raymond*, 1 Con. Rep. 40.—3 Ja-

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cobs' Law Dic. 11.—*Leland* vs. *Marsh*, 16 Mass. 389.—Cowen's Treatise, 220.

In *Percival* vs. *Jones* (2 John. Cas. 49) where a Justice of the Peace, under the ten pound act, issued an execution against the body of a defendant, who was by law privileged from arrest and imprisonment, voluntarily and without the request or authority from the plaintiff, it was holden that he was liable to an action of false imprisonment.—1 Esp. N. P. 2 part, 275.—2 Wils. 384.

So, where an attorney sued out an illegal writ of *ca. sa.* against a defendant, and ordered him to be imprisoned, it was holden that false imprisonment would lie.—1 Swift's Dig. 499.

In *Tarlton* vs. *Fisher et al.* (Doug. 671) *Ashurst*, J., said, "A Sheriff is bound to execute process issuing out of a Court of competent jurisdiction, and though there be no cause of action, or the process is erroneous, he is not responsible. The plaintiff himself, in such cases, is only liable: it is a plaintiff's business to take care how he takes out his writ; if he deliver it to the Sheriff, he takes all upon himself."

The defendants, in the case at bar, took out a writ of execution against the body of the plaintiff, and ordered him imprisoned upon it, when by the laws of the land, he was privileged from arrest and imprisonment. This they did at their peril. They should have been satisfied with an execution against his goods and chattels only.

In *Percival* vs. *Jones*, before cited, the Court said, "that the Justice, when acting in good faith, should be protected. But at the same time, the privilege of the defendant must have its effect; and this can be done with safety to the magistrate, in no other way than by considering the execution as issuing at the peril of the party demanding it."

3. The plea in bar alleges, that the Justice "adjudged that the said Ira & Center might have execution against the goods, chattels, estate and *body* of the said Willis."

This was an *excess* of jurisdiction; and trespass may be supported for imprisonment under the execution.—1 Chitty's Pl. 184.

In *Briggs* vs. *Wardwell* (10 Mass. 356) it was holden

that trespass would lie against a Justice of the Peace, who issued an execution within twenty-four hours from the time of rendering judgement.

4. Trespass lies against a party, who extends the process of the Court to a case, to which it cannot lawfully be extended.—*Curry* vs. *Pringle*, 11 John. Rep. 444.—13 John. Rep. 414.

In Justice's Courts, and all other Courts of special and limited jurisdiction, the rule is strict, that the party becomes a trespasser, who extends the power of the Court to a case to which it cannot lawfully be extended.—1 Stra. 710.—2 Black. Rep. 1035.—Cowp. 610, 647.—2 Wils. 385–6.

The defendants, by ordering the plaintiff imprisoned upon the execution, certainly extended the process of the Court to a case, to which it could not lawfully be extended. After the plaintiff was discharged from his first imprisonment, by the Jail Commissioners, the Justice had no jurisdiction over his person upon any debt due the same creditors at the time of his discharge. And false imprisonment lies, where there is a want of jurisdiction over the person, or over the cause.—*Wise* vs. *Withers*, 3 Cranch. 331.—*Smith* vs. *Shaw*, 12 John. Rep. 257.—1 Con. Rep. 40.—*Marshalsea* case, 10 Coke, 70.

5. If the execution were a lawful one, the plaintiff is entitled to recover in this action, because it was unlawfully served; and false imprisonment lies for the unlawful service of a lawful writ.—*Brown* vs. *Getchell*, 11 Mass. Rep. 11.

6. The legality of the proceedings, under which the defendants claim to justify, may be inquired into in this form of action.—Cowp. 640, 646.—2 John Cas. 49.—3 Cranch. 331.—2 John. Cas. 27.—17 Mass. 153 & 8.

Smith & Peck, for defendants.—1. If the execution under which the defendants justify, is void, then this action may be sustained; otherwise it cannot. In a suit before a magistrate, of which he had jurisdiction, but in which he gave judgement and issued execution for more than $5 cost, contrary to a statute which limited the costs to be recovered to the sum of $5, it was held that the execution and judgement was *voidable* only.—(*Johnson* vs. *Wil-*

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kinson, 17 John. Rep. 145.) The Court, in this case, said, "We have decided that when a Justice has jurisdiction to issue an attachment, but proceeds *erroneously* in doing so, he is not therefore a trespasser. The distinction is this: when the Justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*; but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only." So if an execution be issued previous to the day on which, by law, it ought to have issued, it is not void, but only voidable.—(4 Cranch, 328.) This case contradicts that cited by the plaintiff from Mass. Rep. In the case of *Prigg* vs. *Adams & al.* (2 Salk. 674) the defendant justified under a judgement & execution, which by an act of Parliament, was *void*, and the question was whether the proceedings were so far void as that the party might take advantage of it in this collateral way, and the Court held it was not: that it was only *voidable* by plea or writ of error. In *Allen* vs. *Huntington & al.* (2 Aik. Rep. 249) this decision is cited and approved by the Court, and the same principle recognized. From our examination of these authorities, it will be seen, that the execution in the present case, can in no sense be said to be *void*. The most that can be said against it, is, that it was *voidable*. But what appears to be decisive of this point, is the well-settled doctrine, that for the arrest of one privileged from arrest, either *personally* or *locally*, such as certificated bankrupts, insolvents, &c. trespass will not lie either against the officer or creditor, and this is upon the ground that the process is not *void*; if it was, all the parties to the arrest would be trespassers.—(1 Chitty's Plead. 167.—3 Wils. 379.—1 Mod. 209.—1 Black. Rep. 1190, reported in 10 Petersdorff's Abr. 279.—3 N. H. Rep. 376.—1 Swift's Dig. 497.—3 Vt. Rep, 415.) And it has been held by the Supreme Court of Massachusetts, in cases analogous to the one at bar, in every respect, that the attachments were merely abateable.—(3 Mass. Rep. 193.—1 Pick.) And such is the rule in Connecticut.—1 Sw. Dig.) If the proceedings before Jail Commissioners, in any given case, were void for some irregularity, it is clear, that the debtor, in such case, might lawfully be again arrested and imprisoned on the same debt. This furnishes a

strong argument in support of the validity of the execution under which the defendants justify; for, if an execution may in any case be legally issued against the body of the debtor, on a judgement, on which, he has been discharged from imprisonment, under the act for the relief of poor debtors, it would seem to be more consonant to principle, to hold such executions, in all cases, *voidable* only.

2. If the execution, in this case, is only *erroneous*, then it is a good justification to the defendants, until it is *superseded*.—(3 Hen. & Mumf. 260.—3 Wils. 342, 345, 376.—1 Stra. 509.—Doug. 671.—8 John. Rep. 365.—2 Black. Rep. 846–7, 1191.—1 Aik. Rep. 339.—1 Salk. 273.—15 East. 612.) Chitty lays down the general rule, that no action whatever can be supported for any act, however *erroneous*, if expressly sanctioned by the judgement or direction of any of the superior Courts at Westminster, or by an inferior magistrate, acting within the scope of his jurisdiction.—(1 Chitty's Pleadings, 167.—3 M. and S. 411, 425–7–8.)

In *Belk* vs. *Broadbent*, (3 Term Rep. 183) Lord Mansfield says, "It is incomprehensible to say that a person shall be considered a trespasser who acts under the process of this Court." On what principle, then, can the defendants be made liable in this action? Here, nothing more was done, than to take the body of the plaintiff, which was expressly commanded by the writ. Where a plaintiff sued out a *fi. fa.* against his debtor, after he had paid the debt, and caused him to be arrested, even while attending Court, as a witness, it was holden that trespass would not lie against the plaintiff while the execution was in force.—(2 Con. Rep. 700.—3 Hen. & Mumf. 260.) So, where a creditor caused his debtor, who had taken advantage of the statute of 20 Geo. 3 c 64, to be arrested, when, by the act, he was declared free from arrest, it was held by the Court, that the officer making the arrest, and it was said by the Court *arguendo*, that the plaintiff himself, until *supersedeas*, was not liable in an action of false imprisonment.—(*Tarleton* vs. *Fisher & al.* Doug. 671.) *Buller*, J., therein said, "The original plaintiff would not be liable to an action of trespass till the writ is superseded, for, *till then, it is a justification.*" Thus, a discharge of a debtor

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from imprisonment, by the creditor, has the same effect as a discharge under our statute for the relief of poor debtors; and after such discharge, the debtor cannot be again arrested on the same debt.—(14 Mass. Rep. 443.) But, if in such case, an *alias* execution is taken out on the judgement, by the direction of the creditor, and the debtor imprisoned, false imprisonment will not lie for this second imprisonment.—(Bray. Rep. 119, No. 4.) By a statute law of New-Hampshire, passed in 1818, it is provided that *mesne* or final process shall not issue against the body of a debtor, nor he be imprisoned, unless the debt or damage exceed the sum of $13,33. In a case arising under this statute, when execution was taken out for $8 damages, and $5 costs, against the body of the debtor, and he arrested and imprisoned, it was holden, that the debtor could not maintain trespass for false imprisonment against the creditor, until the execution was *superseded*.—(2 N. H. Rep. 491.) A replication, like the one now before the Court, was ruled against the plaintiff, by this Court, in a case decided in Caledonia County in 1816.—(Bray. Rep. 118, No. 4.)

3. An exemption from arrest, whether that exemption be given by common law, or by statute, is a personal privilege, and may be waived by the party entitled to it. It should be claimed and insisted on at the proper time, or else it will be presumed to be waived, and cannot be set up in a collateral action.—(4 Dallas, 107.—3 John. Cas. 84.—3 Mass. Rep. 193—11 *id.* 11.—15 John. Rep. 152.—2 Aik. Rep. 224.—14 Mass. Rep. 443.—3 Con. Rep. 537.) The plaintiff did not claim his exemption in season, if at all. He suffered judgement to be taken against him, by defendant, and did not appear to object to the execution issuing against his body. In addition to this, he returned from a sister State, and surrendered himself to the officer, in discharge of his bail. These facts are alleged in the rejoinder, and are confessed by the demurrer; and if they do not amount to a waiver of the exemption, it can hardly be conceived what acts would.

4. The plaintiff, by availing himself of his imprisonment under the execution, for the purpose of taking advantage of the poor debtors' oath, waived his *privilege* from arrest, and affirmed the execution.—(3 Cain's Rep. 274.) In ta-

king this course, he treated the execution as valid, and his imprisonment as legal. Had he regarded them in a different light, he should have obtained his discharge by *habeas corpus*, or procured the execution set aside by *audita querela*; and perhaps the Justice, on motion, might have done it, and ordered him discharged. At all events, he should have sought one of these remedies, instead of resorting to his action of trespass, in which, he ought not to be favored. If the plaintiff has *now* any remedy, it is in an action on the case, in which, all the circumstances of the case, and the motives of the defendants in directing the arrest, may be gone into.

The opinion of the Court was pronounced by

BAYLIES, J.—In this case, the County Court rendered judgement for the defendants to recover their costs, and the plaintiff appealed to this Court for their decision on the pleadings.

The several statutes, which have relation to this case, as far as it is necessary to quote them, are as follow:— The act of March 9th, 1797, Sec. 12, says, "Such prisoner (after having received a certificate, that he or she had taken the poor debtors' oath, and having paid certain charges) shall thereupon be discharged; and his or her body be thereafter exempt from execution for the same debt or debts. Sec. 13, "That all and every judgement obtained against any such prisoner, shall, notwithstanding such discharge, be and remain good and effectual in law, to all intents and purposes, against any estate whatever, which may then, or at any time afterwards, belong unto any such prisoner; and a new execution may issue at any time, against the goods, chattels or lands of such prisoner, in the same way and manner, as might have been done, if the prisoner had never been in execution." Sec. 14, "That if any person to whom the aforesaid oath or affirmation shall have been administered, shall be convicted of false swearing therein, he or she shall be liable to all the pains of wilful and corrupt perjury; and shall take no benefit by this act." The act of Nov. 3, 1806, Sec. 2, says, "That the body of any person, who shall be legally discharged from prison, by virtue of either of the aforesaid acts, shall

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thereupon be forever free from arrest and imprisonment, for any debt due and owing at the time of his being discharged as aforesaid, to the creditor or creditors, on whose suit he had been discharged."

1. The plaintiff's discharge from imprisonment, mentioned in his replication, should have been pleaded to the action, in which Lamb and Day recovered $14,33 debt and damages against the plaintiff, as mentioned in the defendants' plea in bar. But as the plaintiff did not plead his discharge in abatement, nor in bar in that action; nor express that he placed any reliance upon his discharge before the Court; but suffered himself to be defaulted in that action, and judgement to be rendered therein, and execution to issue against his body, and himself to be carried to jail, and to be committed on the execution; and then to be discharged from his imprisonment, on taking the poor debtors' oath. All this, in judgement of law, was a *waiver* of his discharge, mentioned in the plaintiff's replication; and he shall not now be permitted to set up his discharge to make his aforesaid imprisonment *unlawful*, that he may recover damages in this action for false imprisonment.

There is a strong resemblance between *our* statute of 1797, and the statutes of *Massachusetts* and *New-York*, as to the exemption from arrest, and imprisonment of a person, who has taken the poor debtors' oath. If the writ of *Lamb* and *Day* against the plaintiff, in the action in which they recovered $14,33, debt and damages, was an attachment, and the plaintiff was arrested thereon, and at the same time he was exempt from arrest, he might have pleaded his privilege in abatement of the writ, according to the case of *Willington* vs. *Stevens*, 1 Bick. 497.—(See also *Cooper* vs. *Gibbs*, 3 M. R. 193.)

But if the writ was merely a summons, the plaintiff might have pleaded his discharge in bar of the execution issuing against his body. I so understand the opinion of the Court in *Cable* vs. *Cooper*, 15 J. R. 152.—In that case, Judge *Van Ness* says, "The defendant, in the original action, was bound to plead his discharge, and he wished to avail himself of his exemption from imprisonment for the same cause, secured to him by statute. If he had been convicted of perjury in procuring his discharge, he was, notwithstanding

his discharge, liable to be again imprisoned, either on the old judgement, or under a new judgement recovered upon the old one, in an action of debt; and if the discharge had been pleaded, the plaintiff might have replied to it such conviction, which would have been conclusive to bar him of his exemption."

So in the action at bar, if the plaintiff had pleaded his discharge, *Lamb* and *Day* might have replied facts, within the 14th section of our act of 1797; or they might have replied, "that at the time the plaintiff obtained his discharge, the note in suit was not then *due*, and *owing* to them, but was *due* and *owing* to A. B. to whom they had previously assigned said note, and this action is brought for his benefit."—Proving these facts would take the case out of the statute of 3d November, 1806. But in the case above, (15 J. R. 152) Judge *Van Ness* says, "The privilege from imprisonment to which Brown (the debtor) was entitled under the statute, certainly might be *waived*, and the omission to plead the discharge in proper time was *a waiver*.

"So the protection, which a person has from arrest, while attending Court, or a party to a suit, is a personal privilege, of which the party, entitled to rely upon it, may avail himself to prevent, or defeat an arrest: but if he *waives* the privilege, and willingly submits himself in custody to the officer, he cannot afterwards object to the imprisonment as *unlawful*, or as made by a bad authority. A *waiver* and voluntary submission are to be presumed; at least there are no allegations to the contrary in the bar on which the defendants rely."—*Brown* vs. *Getchell et al.* 11 Mass. Rep. 11.

"Every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The Judges are not bound, judicially, to notice a right of privilege, nor to grant it without claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a *waiver*, by which the party is forever concluded."—*Geyer's Lessee* vs. *Irwin*, 4 Doug. 107.

The same principles are recognized as law in *Hess* vs. *Morgan*, 3 J. C. 84; and in *Fletcher* vs. *Baxter*, 2 Aik. 224. *in Error*.

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It cannot be necessary to produce more authorities to show, that the plaintiff could *waive* his personal privilege; nor to produce more evidence to show, that he did *waive* it in this case.

2. It is a rule of law, that a judgement of a court of record, having jurisdiction, must have the effect of a regular judgement, however erroneous it may be, until it is reversed; and it cannot be reversed in a collateral action. And no judgement is *absolutely void*, but such as was rendered by a Court having no jurisdiction. The judgement of $14,33 debt and damages, mentioned in the plea in bar, was a regular judgement, rendered by a court of record, possessing competent jurisdiction; and the writ of execution, which issued thereon, was a regular writ, in due form of law, and is a justification of every act of the defendants done under it, in pursuance of its precept.—It justifies the defendants, one as creditor, and the other as his attorney, in taking out the execution, delivering it to a proper officer for collection, and imprisoning the plaintiff by it, he having refused and neglected to pay and satisfy said judgement. But I go farther, and say, if the writ of execution should not have issued against the plaintiff's body on account of his privilege, and it did issue against his body, it is not *void* on that account; but merely *voidable*. and is a justification of every act of the defendants under it. But if it was *absolutely void*, it would justify no act whatever.

The *English* and *American* Reports fully establish the doctrine which I have advanced: See 17 J. R. 145, *Jackson* vs. *Wilkinson*.—3 Caine 267, *Reynolds* vs. *Cope et al.*—3 Hen. & Mumf. 260, *Moore* vs. *Chapman*.—4 Cranch 238, *Blaine* vs. *Ship Charles Carter et al.*—2 Salk. 674, *Prigg* vs. *Adams*.—2 Aik. 249, *Allen* vs. *Huntington et al.*—1 Stra. 509, *Philips* vs. *Biron et al.*—Doug. 671, *Tarlton* vs. *Fisher et al.*—10 Petersd. 279, also 2 Black. 1190, *Camron* vs. *Lightfoot*.—15 East. 612, *King* vs. *Harrison et al.*—3 Con. Rep. 537, *Swift* vs. *Chamberlain*.—2 N. H. Rep. 491, *Blanchard* vs. *Goss*.

The case at bar is not entirely new in principle in this State: At Caledonia County Supreme Court, February Term, 1816, the case of *John Johnson*, Appellant, against *W. W. M. Gaffey*, Appellee, came on for trial: It was an

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action for Assault and Battery and False Imprisonment.--- The defendant plead in bar a regular judgement, and execution in his favor, and against the plaintiff, and a lawful imprisonment of the plaintiff by said execution; which imprisonment the defendant averred to be the supposed trespass complained of by the plaintiff. The plaintiff replied his exemption from arrest and imprisonment by this execution, because it was a debt due and owing from him to the defendant, when the plaintiff on a former day, took the poor debtors' oath, and was legally discharged from his imprisonment on another execution in favor of the defendant against the plaintiff; and relied on the act of 3d November, 1806. The defendant demurred to the plaintiff's replication, and the plaintiff joined in demurrer. The Court rendered judgement for the defendant. There is a short note of this case in *Brayton's Reports*, p. 118.

The plaintiff has referred to several cases where trespasses were committed under *void* precepts; but we consider that these cases do not apply.---Here the writ of execution was not *void*, but *valid*.

Judgement, that the plaintiff's replication is insufficient; and that from having, and maintaining his action against the defendants, he ought to be barred, and they recover their costs.

URI BABBIT *vs.* DANIEL JOHNSON and BENJAMIN DUNOUT.

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The act of the 11th of November, 1818, which prohibits *a Deputy Jailer, or any person who is confined within the liberties of any jail, from officiating as a Judge or Justice in any case arising under the 12th Section of an Act, entitled,* "An Act relating to Jails and Jailers, and for the relief of persons imprisoned therein," will not extend to the doings of a Commissioner of Jail Delivery, who has acted in that capacity while confined to the liberties of the jail-yard.

This case came up for trial upon the following statement of facts agreed upon by the parties:

"The defendants admit due execution and assignment by the Sheriff of the bond declared on, and also the recovery of the judgement, issuing of execution, and commitment of Johnson, one of the defendants, to jail, as set forth in said declaration.

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"And on the other hand, the plaintiff admits that a citation was duly taken out & served on him to appear before the Jail Commissioners, on the 28th day of October, 1829, to shew cause why said Johnson should not be admitted to take the poor debtors' oath: That he attended, and made objections on the ground that said Johnson owned property---that said Jail Delivery Court was holden by T. Merrill 2d, and Aaron Porter, only---both of whom were duly appointed, together with B. F. Deming, Jail Commissioners for said County, for said year: That said Merrill and Porter decided that said Johnson was entitled to take the oath, which was administered by said Merrill; and that two certificates, as prescribed by statute, were made, signed by said Merrill and Porter, and delivered to said Johnson---one of which was by said Johnson, on the same day, left with the then keeper of the jail in said County; and that afterwards, on the same day, and not before said Johnson departed out of the liberties of said prison. It is also agreed, that at the time of holding said Jail Delivery Court, said Aaron Porter was confined a prisoner within said liberties, by virtue of an execution issued upon a judgement in favor of J. B. Pitkin, by his guardian, J. Bowers, against said Porter. Now, if from the above facts, the Court should be of opinion that the plaintiff is entitled to recover, judgement is to be rendered in his favor for his debt, damages and costs----if otherwise, that defendants shall recover their costs."

After argument, The opinion of the Court was pronounced by

PADDOCK, J.---The case which the parties have brought before the Court for our consideration, involves this question: that is, whether the act of 11th November, 1818, which prohibits *a Deputy Jailer, or any person who is confined within the limits of any jail, from officiating as a Judge or Justice in any case arising under the* 12th *section of an Act entitled*, "An Act relating to Jails and Jailers, and for the relief of persons imprisoned therein," will extend to the doings of a Commissioner of Jail Delivery, who has acted in that capacity while confined to the liberties of the jail-yard.

The 12th section of the law of 1797, relating to Jails and Jailers, and persons imprisoned therein, authorizes a prisoner who is unable to pay, to apply to a Judge of the Supreme or County Court, and a Justice of the Peace, to be discharged from his imprisonment; constituting said Judge and Justice a Court of Jail Delivery for the purpose of examining such applicant, and if found to come within the provisions of the law, to administer the oath to him therein described, and give him certificates of his discharge from imprisonment. On the 11th day of November, 1818, the Legislature passed the act prohibiting a Deputy Jailer or any other person who thereafter shall be confined within the limits of said prison, from officiating as a Judge or Justice, &c.; and on the 16th day of November, 1829, the Legislature passed another act, directing the Supreme Court annually, at the Law Term in each County, to appoint three Commissioners, which Commissioners, the act declares shall *exclusively* perform the same duties within their respective Counties, which were before performed by a Judge and Justice of the Peace. This act, although it repeals the 12th section of the act of which it is an amendment, puts no restrictions upon Commissioners who may by chance be imprisoned, nor does it in any manner allude to the act of 11th of November, 1818. The question then arises, Can the act last named, upon any ordinary method of construction, govern that which was subsequently passed on the 16th November, 1829? The act of the 11th is not a portion of the laws directing the method of jail delivery; but a provisional suspension of magistrates from acting under the authority of the 12th section of the law of 1797, who were themselves confined within the limits of the jail-yard: It is not a law under which any authority heretofore have acted, but is prohibitory: not creating an operative power, but restricting one already created.---It bears upon the 12th section, only modifying and restricting its operation; and is to be taken as an appendage to it.—It follows then, that if the 12th section be repealed, the effect would be, to render this act a dead letter. We therefore consider, that the 12th section of the law of 1797, so far as, by its general terms, it permits Judges and Justices to officiate as members of Courts of Jail Delivery, who at

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the time may be confined in jail, or in its limits, is limited and modified by the act of the 11th November, 1818. So the act of the 16th of November, 1829, by creating a Board of Commissioners *exclusively* to perform the same duties, virtually repeals that portion of the 12th section, and with it, the act of the 11th of November, 1818. But if there were any doubt upon that subject, it would seem to be removed by a later law, passed in 1822, which points out what shall be disqualifications in Commissioners; and being confined to the jail, or its limits, is not included.

Judgement affirmed.

Charles Davis, for plaintiff.
Wm. Mattocks & James Bell, for defendants.

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ASA BATES *vs.* ALVAN CARTER.

A purchaser of personal property at a Sheriff's sale, will hold the same, although the officer makes no return on the execution, that previous to the levy upon the same, he demanded the money of the debtor. *Sed Quere* as to real estate.

In such case, it seems that the purchaser will acquire a good title, although the officer is liable to the debtor by reason of defects in his return on the execution.

Where personal property, purchased at a Sheriff's sale, is left in the custody of the execution debtor, it is not liable to attachment for his debts.

This case comes up here from the County Court upon exceptions taken to the acceptance of a report of Referees there made and objected to by the defendant. A further statement of the facts in the case, and the points relied on by counsel, will be found by a reference to the opinion of the Court.

Argument for the defendant.—The defendant insists, that the plaintiff, to support his action, must show that the Constable's sale, under which he claims title, was a valid sale; and to make it a valid sale, it must appear from the officer's return.

1. That he repaired to the debtor's usual place of abode, and demanded of such debtor, the sum in debt, damages or costs, contained in such execution.---Stat. 208.

In a levy of an execution, a demand of the debtor per-

sonally, or at his usual place of abode, is an essential prerequsite: and in delivering the opinion of the Court, in the case of *Dutton* vs. *Tracy*, (4 Con. 365) *Hosmer*, Ch. J., said, "The law explicitly requires, that the officer shall repair with the execution put into his hands for service, to the debtor's usual place of abode, and make demand of the debt, as the first step of his proceeding: The object of this enactment was, to give the debtor an opportunity of making payment in prevention of unnecessary costs; and if he could not do this, to confer on him the power of exposing such goods and chattels for sale for raising the money requisite to satisfy the execution, asshould be least injurious to him: This is a matter '*stricti juris*,' and it is only after the defendant neglects or refuses, on such demand, that the officer is authorized to seize property to satisfy such execution.

2. That the officer, after having taken the property, advertised the same, on the sign-post of the town in which it was taken, (or such other place as was agreed upon by the officer and debtor) to be sold at *public vendue* at least fourteen days before the sale.---Stat. 209.

A general return, that the officer, after having posted the property for sale as the law directs, sold the same, is not sufficient to pass an interest in the property to the purchaser.---*Davis* vs. *Maynard*, 9 Mass. 242.---*Howe* vs. *Starkweather*, 17 Mass. 240.

3. That the debtor having neglected, for the fourteen days, to redeem the property by paying the damages and costs, the officer sold the same at *public vendue* to the highest bidder, at the time and place appointed in said advertisement for the sale of said property.---Stat. 209.

4. That having sold the property, the officer made return of said execution with his doings thereon, particularly describing the goods and chattels taken and sold, and the sum for which *each article* was struck off.---(Stat. 209.) This provision of the statute is peculiarly calculated to prevent the officer from practicing fraud, either upon the debtor or purchaser, by making a general return of his sales in gross sum, and should be most strictly adhered to. To vest an interest in the purchaser in property sold on execution, the officer must make a return, that would be

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sufficient to justify himself, and this return must be made in *writing*, and parol testimony is inadmissible to aid any defect in such return (*Metcalf* vs. *Gillet*, 5 Con. 400); for the return of the officer is the legal and only evidence that the prescriptions of the law have been complied with.

A written notice by the officer, stating particularly his proceedings, is necessary to vest in any purchaser under an execution, a property in the goods of the debtor; and he cannot make title to the goods, without showing by the return, that the directions of the law have been observed in the sale.—*Hammat* vs. *Wyman et al.* 9 Mass. 138.

When the law requires the return of an officer to be in *writing*, the *whole* of the return must be in writing; and parol evidence cannot be admitted to amend it.—*Davis* vs. *Maynard*, 9 Mass. 242.

When an officer returned on a warrant of distress, that he advertised the goods distrained *twenty-four hours* before sale, he was not permitted to give parol testimony in an action of trespass against him for taking the goods, that he in fact advertised them *forty-eight hours* before the sale.—*Purrington* vs. *Loring*, 7 Mass. 388. As it was his duty to return his doings in writing, he could not justify by parol return: nor could parol evidence be admitted to vary a written return; and the officer was therefore made liable as a trespasser *ab initio*.

In *Williams* vs. *Amory*, 14 Mass. 20, *Parker* Ch. J. said, "that every thing made necessary by the statute to pass the property either in land or chattels, must appear by the return of the officer to have been done."

When a Sheriff returns upon an execution that he has appointed *two* of the appraisers of real estate to be levied upon (when the debtor has a right to appoint *one*, unless he refuses so to do,) the Sheriff must also return that the debtor refused to choose one, or the levy will be void.—*Eddy* vs. *Knapp*, 2 Mass. 154.—*Mather* vs. *Chapman*, 6 Con. 54.

The acquisition of title by execution being a proceeding *in invitum*, the requisites of which are prescribed by positive law, a strict compliance with the requisites is indispensable to a transfer of title.—*Mitchel* vs. *Kirtland*, 7 Con. 229.—*Hobart* vs. *Frisbie*, 5 Con. 592.

By requiring the officer to pursue the directions of the Statute strictly, in taking and disposing of property on execution, the purchaser cannot be subjected to loss. But if the officer neglects to pursue the requirements of the law, so that the purchaser acquires no title, the officer would be liable in an action on the case for neglecting to make a sufficient return, and the purchaser would recover his damages.—*Hammat* vs. *Wyman*, 9 Mass. 138. The same would be the case, when an officer, through mistake, sold the property of a third person, instead of the debtor, the purchaser could acquire no title, as against the actual owner, though the officer might have pursued all the steps of the law necessary to convey a good title, had the property belonged to the debtor. If an officer, in either taking or disposing of property on execution, pursue such a course as would render him a trespasser *ab initio*, a purchaser under him could acquire no title; for the officer being but a trespasser himself, could convey none, upon the established principle that "no one can transfer a greater right to another than he has himself."

Again, the defendant insists, that the officer, in the case at bar, could not have justified under his return, in an action of trespass against himself, but would have been adjudged a trespasser *ab initio*, for the following defects apparent upon the face of the return:

It does not appear from the officer's return,

1st, That he demanded of the debtor, the sum in debt, damages or costs, contained in the execution; and that the debtor neglected or refused to pay the same before he seized the property.—

2d, That he forthwith advertised the same on the sign-post of the town in which they were taken, (or that he and the debtor agreed upon any other place) to be sold at *public vendue*.—

3d, That said mare and waggon were posted for sale fourteen days before the sale.—

4th, That the debtor neglected to redeem said mare and waggon.—

5th, That he sold the mare and waggon at the *time* and *place* at which they were advertised to be sold.—

6th, That he sold the mare and waggon at *public vendue*.—

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7th, That he returned upon the execution the *sum* for which either the mare or waggon was struck off—See form of return, *Backus* Sheriff, 347.

Argument for the plaintiff.—1. All the objections to the Constable's return, excepting the one that it does not appear what each article was sold for, are directly overruled by the case of *Battie* vs. *Robin*, 2 Vt. Rep. 181; and this objection is virtually disposed of by that dicision. The statute, it is true, requires, that the officer should state in his return, for what sum each article was struck off; but this is required for the benefit of the debtor, to protect him against any collusion or fraud in the sale; as the same section, which contains this requisition, provides that the debtor may recover of the officer treble damages for the sum defrauded.—Com. Stat. 207, Sec. 1. The debtor perhaps might maintain an action against the officer for an omission to state this fact; but the omission cannot prejudice the rights of a purchaser under the Sheriff's sale. The requisition is indeed to be regarded as directory, as the statute does not declare the sale void in case this fact does not appear from the return; and consequently the sale is valid, so as to vest the property in the plaintiff.—3 Mass. 230. The decisions in Massachusetts and Connecticut, which are relied upon by the defendant, it is believed, have not been followed in this State. Our statute requires the execution to be returned within sixty days, (Comp. Stat. 87, Sec. 75); and when the judgement is over fifty-three dollars, in one hundred and twenty days.—Stat. 137, Sec. 3—do. 209, Sec. 1. This seems to be equally imperative with the other requisition; but it has never been deemed absolutely necessary, in order to vest the property in the purchaser, that the execution should be filed in the office whence it issued at the return day.

In *Ingersoll* vs. *Sawyer*, (2 Pick. R. 276) it was said by *Parker*, Ch. J., that "it is the duty of the officer who has made service of any precept, to make return of it according to its terms; and an action will lie against him if he neglects this duty. But if he, as a minister of the law, has executed it properly, the purchaser will not be defeated

of his title, merely because the execution is not filed in the Clerk's office on the return day."

2. A purchaser at a Sheriff's sale is not bound to show that the Sheriff pursued every requisition of the law. This title cannot be defeated for error or irregularity in the judgement or execution, or on the ground that no levy was made till after return day.—1 John. Cas. 123.—13 John. R. 97.—8 John. 361.—6 John. 44. So a purchaser is protected, although the judgement be rendered for error.—Dyer, 363.—Cro. Jam. 246.

In *Vesy*, 195, it is said, "however questionable the proceedings are, if the writ is not void, the purchaser will gain a title under the Sheriff; for it would be very hard if it should be at the peril of the purchaser under a *fieri facias*, whether the proceedings were regular or not.—2 Tidds's Practice, 935. So it may be said in the present case, that it would be extremely hard for the plaintiff to lose his title to the property in question, because of the neglect of the officer, inasmuch as he had no control over the officer on execution, and it was out of his power to remedy the defect. Indeed, to hold this objection as fatal, will, it is believed, work a serious injury to judgement debtors; for there is hardly any one who would bid off property at a Sheriff's sale, if knew he would not be protected in his purchase if the proceedings of the Sheriff were irregular.

3. By the seizure of chattels on execution, the property is divested, and is in the Sheriff; and if he seize to the value, the execution is satisfied, although no return be made.—1 Lev. 282.—6 Mod. 290.—2 Roll. 57.—4 Mass. R. 402. And by analogy, in this case, by the seizure the property vested in the officer, and his subsequent sale, however irregularly made, would convey the title.

4. The parol evidence offered and admitted, was proper to show a sale in fact, and sufficient to vest the title in the plaintiff. The statute of New-York contains requisitions similar to those of our statute for the sale of personal property on execution. Yet a sale of personal property on execution may there be proved by parol.— 6 John. R. 44. So where a statute points out a particular mode of levying an execution, and it is not followed, the

WASHINGTON, March. 1831.

Bates vs. Carter.

common law may be pursued.—1 Harris' Dis.—McHenry's R. 434.

The opinion of the Court was pronounced by

PADDOCK, J.—As this case is presented by the report of the referees, it does not readily appear in what manner the defendant became connected with the property; but from the arguments of counsel, and the copy of an officer's return on a former execution, we gather the following as facts, to wit: That one *Peter Nichols*, a Constable of Barre, had in his hands for collection, an execution in favor of *Daniel Spring* against *Carver Bates*; upon which execution appears the following return:

"Washington County, *ss.* Barre, August 21, 1827. I "then served the within execution, when turned out by "plaintiff, on one sorrel mare and one horse wagon; posted "the same for sale as the law directs, at the dwelling-house "of *James Hale*, in Barre, and on the fourth day of Septem- "ber, 1827, sold said mare and waggon to *Asa Bates* for "$18, he being the highest bidder.

"Attest, PETER NICHOLS, *Constable*."—That *Asa Bates* took the mare to *Carver Bates* and left her in his possession; after which, *Alvan Carter*, acting as Sheriff's Deputy, having a process against *Carver Bates*, and finding the mare in his possession, attached her thereon; for which, *Asa Bates* has brought this action.

The counsel for the defendant has argued the cause, and rested the defence wholly upon the insufficiency of the officer's return upon the execution, *Spring* vs. *Carver Bates*; first, that it does not appear that the officer made a demand upon the execution debtor for the money, before levying upon the property in question. Whatever may be the decision in cases where real estate is set off, we are not prepared to say that the officer must in all cases demand payment of the execution debtor before he can legally levy on personal property; such a requirement would very frequently occasion the loss of the debt; for while the officer would be in pursuit of the debtor, the property might be concealed or conveyed beyond his reach.

Several other exceptions were insisted upon by the defendant, which might be urged with more propriety, were

the execution debtor prosecuting *Peter Nichols*, the Constable; but they can have but little if any application, when the right acquired by the purchaser, to the property sold, is called in question: Very few people would risk their money, were the title to their purchases to depend upon the legality of the officer's proceedings; and for that reason, the policy of the law is to protect purchasers: and in this particular, there is an analogy between a Sheriff's sale, and a sale *in market overt*.

Had *Asa Bates* purchased the horse of *Carver Bates*, and left him in his possession, according to the settled law of the State, he would have been liable to the attachment of the creditors of *Carver Bates*; and it is equally well settled, that where a purchaser at a Sheriff's sale leaves the property in the custody of the execution debtor, it cannot be so taken; because, every presumption of fraud is done away, by the open, public and notorious sale by the officer. —*Kidd* vs. *Rawlinson*, 2 B. & P. 59.

In the present case, the Court consider that *Asa Bates* acquired a title to the horse in question, and his leaving him in the possession of *Carver Bates* after the sale and purchase, did not make him liable to the attachment of *Carver Bates*' creditors; therefore, the judgement of the County Court must be affirmed.

Judgement affirmed.

Smith & Peck, for plaintiff.
Kinsman & Upham, for defendant.

AN

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6. Nor is the original debtor a competent witness for the plaintiff to prove the payment to the defendant without a discharge. *Ib.*

AUDITA QUERELA.

1. That an Audita Querela must be served upon all who are named as defendants, or it may be abated.—*Clark* vs. *Freeman*, 122

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3. That when service of a writ of Audita Querela is made upon one only of two defendants, and he neglects to plead in abatemant, but goes to trial upon the merits, and there is a verdict against him, with nominal damages and cost, it is then too late for him to move to dismiss the suit for want of service on the other defendant; but the Court will proceed and render judgement, that the execution be set aside, with nominal damages and cost; leaving the original judgement in full force. *Ib.*

4. That an Audita Querela is the correct remedy for the party aggrieved by the refusal of a Justice of the Peace to allow an appeal, when it ought to have been allowed.—*Tyler* vs. *Lathrop*, 170

5. A writ of Audita Querela is not within the eleventh section of the Statute of Limitations, which requires writs of error, &c. to be brought within a year from the rendition of the judgement.—*Stone* vs. *Seaver*, 549

6. It is not necessary in a writ of Audita Querela to allege that the act complained of, was done fraudulently and deceitfully, especially if the acts complained of do shew fraud and deceit in the party, *Ib.*

7. Where a plaintiff procures a deputized person to make a return that he served a writ by leaving a copy with the defendant, when he knew that no such copy was left, and that no notice was given to the defendant, and takes a judgement thereon, such judgement will be declared null on a writ of Audita Querela, and the party against whom it was rendered may recover all damages which he has sustained thereby, *Ib.*

8. Such Audita Querela may be maintained although no execution has issued on the judgement, *Ib.*

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1. It is not a question of law, but matter of fact for the Auditor to find, whether fifty cents per week agreed upon between A. and B. as the wages of A. for eleven weeks work, was by agreement, or understanding of the parties, to be the price of other labor done by A. for B. eight months afterwards.—*Macks* vs. *Brush*. 70

2. This Court will always presume the Auditor did his duty, unless the contrary appear, *Ib.*

3. The act relating to actions of account has been construed to require the Auditor to state in his report, what items of account he allowed, and what items he disallowed; but he need not state the ground, or reason of allowing, or disallowing any item, unless specially requested, *Ib.*

4. If the Auditor be requested to report the ground, or reason of his allowing or disallowing an item of account, and he refuses to do it, this may be set forth in exceptions to his report, and proved by affidavits: all which would tend to show partiality, unfairness, or corruption in the Auditor, and deserve the consideration of the Court, *Ib.*

5. It is not error for Auditors to refuse to report the whole evidence, instead of the facts in the case.—*Strong* vs. *McConnel*, 338

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8. Reports of Auditors must present all the questions of law, by them decided, which the parties require to have examined by the Court on accepting or rejecting the report.—*Thompson* vs. *Arms*, 546

9. No affidavits or statements of Auditors, not incorporated in their report, can be heard in objection to accepting the same, unless it be to show misconduct in the Auditors, or that they refused to state the facts, so as to present the questions of law, or for the purpose of showing new discovered evidence, *Ib.*

10. The determination which the County Court makes on affidavits used for the purpose aforesaid, is not subject to be re-examined by this Court, *Ib.*

11. When the County Court have accepted the report of the Auditors, the Court will not remand the cause to them to enable the party to move that Court to recommit the same to Auditors, especially in a case where the sum is small, and there was evidence on both sides, *Ib.*

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C

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3. That a deed may be impeached by proving the sayings of the grantor, after the date and signing, but before the acceptance by the grantee.—*Denton* vs. *Perry et al.* 382

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5. That a common quit-claim deed, with a consideration in money named, and a condition to redeem, on paying back such consideration with interest, is not evidence of a debt, like the common case of a note and mortgage, but is more in the nature of a right to re-purchase.—*Henry* vs. *Bell*, 394

6. That a man, who gives such a quit-claim deed of land, to which he professes to have no title except a mere parol right to redeem, may acquire right by descent, and hold possession adverse to his grantee, *Ib.*

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1. In an action brought by a plaintiff against two or more defendants, if the writ is not served on all, but a *non est* is returned as to some, those defendants on whom service is made, may avail themselves of any defence which all the defendants could make if the writ had been served on all.—*Mott* vs. *Mott*, 111

2. The defendant, on whom the writ is served, may plead in offset any sum proper to be plead in offset due from the plaintiff to all the defendants against whom the writ is issued, *Ib.*

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DEMURRER.

See Bill in Chancery, 2.
Usury, 1, 2.
Vi et Armis, 1.

DEPOSITION.

1. The length of notice to the adverse party of the taking of a deposition, not being fixed by statute, it becomes a matter of discretion with the Court in which the deposition is to be used, to judge of the reasonableness of such notice.—*Hough* vs. *Lawrence*, 209

2. It is the province of the magistrate, taking a deposition, to judge of the capability of the witness to narrate facts, *Ib.*

3. The testimony of a magistrate taking a deposition, offered to show an *apparent* want of intelligence in the deponent, is inadmissible, *Ib.*

4. That the fee of thirty-four cents, allowed a Justice of the Peace for taking a deposition, including the caption and certificate, does not include the writing of the deposition.—*Lockwood* vs. *Cobb*, 422

5 That, if the magistrate writes the deposition of a witness, he incurs no penalty under the statute of 1821, by taking pay for such writing, besides thirty-four cents for the caption and certificate, *Ib.*

DISCHARGE.

When one of the heirs of an estate appears before the Court of Probate on his own account solely, to oppose the allowance of an administrater's account, and the administrator in consideration of his withdrawing his objection to the account, executed a discharge of a debt, which, as administrator he held against him, such discharge is executed upon a valuable consideration, and will discharge any action brought to recover the debt.—*Morgan's* Adm'r vs. *Blodget*, 320

See Administrator, 3.

DISCLAIMER.

The effect of a Disclaimer at common law.—*Marshall* vs. *Wood et al.* 250

See Joinder, 5.

DISCLOSURE.

See Trustee, 3.

E

EJECTMENT.

See Execution, 3.

EMANCIPATION.

See Settlement, 2, 3.

EQUITY OF REDEMPTION.

1. That a levy of execution upon an equity of redemption is good, when described as all the debtor's equity of redemption in the premises, stating also the nature and amount of the incumbrance, if the execution cannot be satisfied with less than the whole of such equity of redemption.—*Collins et al.* vs. *Gibson et al.* 243

2. That an execution, not large enough to take the whole of the debtor's equity of redemption, must be levied upon an undivided portion of the whole. *Ib.*

ERROR.

Cases brought up to the Supreme Court by exceptions are treated as upon writ of Error.—*Penniman* vs. *Patchin*, 346

See Court, 1.
Charge to Jury, 1.
Exceptions, 2.
Auditors, 5.
Fraud, 1.

ESTOPPEL.

See Partnership, 1.

EVIDENCE.

1. That a letter, written by the plaintiff to A. C. making propositions evidently relating to transactions of B. C.; there being no such person known as A. C., is admissible to the jury as evidence against the plaintiff, of facts therein recited.—*Wilkins* vs. *Burton*, 76

2. Parol evidence is inadmissible to contradict, vary, or explain a written contract, or show it different from what it purports to be.—*Bradley* vs. *Anderson*, 152

3. If A, as payee of a promissory note, sue B as maker of the same, B shall not be permitted to give parol evidence of facts, which amount only to an *innocent mistake* in A in writing the note, to prevent A's recovery; nor shall B give parol evidence of such facts, under the false pretence that they show *fraud* in A in writing the note, *Ib.*

4. If A execute to B his promissory note, and C endorse his name in blank on the same, parol evidence is admissible to show the understanding that C. was to be holden only collaterally.—*Barrows* vs. *Lane et al.* 161

5. Parol evidence is not admissible to show that a note, purporting to be absolute, was to be payable only on condition.—*Farnham* vs. *Ingham et al.* 514

6. A subsequent agreement by parol that a note may be paid in a different way than is expressed in the note, if the agreement is performed, may be given in evidence in an action on the note, *Ib.*

7. Such agreement, made at the time the note was executed, is admissible in evidence, *Ib.*

8. A written entry in a book, made by a person against his interest at the time, is, after his death, admissible as evidence of the fact between third persons, if he could have been examined to it in his life-time.—*Chase* vs. *Smith*, 556

9. At common law, a party to a suit cannot give in evidence his own book, without the evidence of some third person to show that the entries were justly made, *Ib.*

10. The defendant to an action shall not be permitted to defeat the claim of the plaintiff by crediting such claim to the account of a third person, and giving the same in evidence to the jury, without evidence that the plaintiff consented to such credit, *Ib.*

11. A party to a suit shall not make evidence for himself, *Ib.*

12. A father can *verbally* sell, or give his minor son his time, till he is twenty-one years of age; and after that, the son is entitled to his earnings, *Ib.*

13. In an action between A and B., A may give in evidence on the second trial of the action, what C testified on the first trial—C being now dead.—*Glass* vs. *Beach*, 172

See Book, 5, 6.
Court, 1.
Usury, 6.

EXECUTION.

1. That a deed, conveying all the grantor's right to certain premises, acquired by the levy of certain executions, conveys no more than the grantor acquired by such levy.—*Wilkins* vs. *Burton*, 76

2. That, if such levy be for an undivided half, possession taken under such deed or levy will be considered *prima facie* as possession of half only, and that for the benefit of the other owners, *Ib.*

3. In ejectment, where the defendant's title is derived from the plaintiff by levy of execution upon the lands in question, he cannot object to the plaintiff's introducing a deed of the same to substantiate his title from a third person, executed to him while the defendant is in possession, on the ground that such possession is adverse, even should the levy prove void. Such deed being in confirmation of defendant's title, inures to his benefit.—*Hall* vs. *Hall*, 304

4. When an officer extends an execution upon real estate, he must make out and subscribe his return within the life of the same; otherwise no title passes to the creditor—the whole proceeding being void, *Ib.*

5. If by the return of the levy of an execution on real estate, as recorded in the Town Clerk's office, it appears that the levy was

for a larger amount than the execution, no title passes by such levy, notwithstanding the return appears to be correct on the original execution.—*Skinner et al.* vs. *McDaniels et al.* 539

6. Such record would be notice only of a void levy; and purchasers and attaching creditors might consider it as void, *Ib.*

7. The execution and return in such a case are not recorded in the Town Clerk's office as directed by statute, *Ib.*

See LIMITATION OF ACTIONS, 2

EXEMPTION FROM ATTACHMENT.

1. A cook stove is exempted from attachment as a necessary article of household furniture.—*Hart* vs. *Hyde*, 328

2. That potash kettles, set in arches in the usual way for use, are liable to be levied upon and sold as personal property. But, if it were not so, the defendant's taking them, & causing them to be sold on his own execution, precludes his pretending to excuse himself by saying they were real estate.—*Wetherby* vs. *Foster*, 136

3. Fresh beef killed in the month of December, is liable to be seized and sold on execution.

Dictum. Property perishable in its nature, or liable to suffer serious diminution by keeping or removal, may not be liable to be taken on legal process.—*Leavitt* vs. *Holbrook*, 405

See SHERIFF'S SALE, 3.
IMPRISONMENT, 2, 3.

EXCEPTIONS.

1. That the decision of the County Court upon a motion for a new trial cannot be carried up to the Supreme Court by exceptions to such decision.—*Bloss* vs. *Kittridge*, 28

2. That the refusal of the Court to receive a plea, after the last continuance, or the taxing of witness' travel and attendance, cannot be assigned for error, unless the grounds of decision are placed upon the record by a bill of exceptions.—*Higgins et al.* vs. *Hayward*, 73

3. The exceptions to the decisions of the County Court bring up to the Supreme Court no questions of fact, but only the questions of law arising upon facts found or agreed to.—*Lovell* vs. *Field et al.* 218

F

FALSE IMPRISNOMENT.

See IMPRISONMENT.

FEME SOLE.

See ADMINISTRATORS, 6.

FEES.

See DEPOSITION, 4, 5.

FORECLOSURE.

See BILL IN CHANCERY, 1.

FRAUD.

1. That it is not error for the Court to instruct the jury, that they may infer fraud in the contract of defendant and son, who was a bankrupt, to pay plaintiff for his labor, done for defendant when plaintiff was a stranger, and the defendant and his son knew of this bankruptcy, and did not make it known to the plaintiff.—*Carrigan* vs. *Hull*, 22

2. A fraud in fact may exist in the sale of goods, although the purchaser pays full value, and receives possession.—*Fuller* vs. *Sears et al.* 527

3. A sale of goods *bona fide*, and at the same time *a fraud in law*, explained, *Ib.*

4. Fraud *in fact*, and fraud *in law*, are often interwoven; and when it is so, if the plaintiff prove *fraud in law*, it may be sufficient to entitle him to recover, without showing fraud *in fact*, *Ib.*

5. Fraud *in law* means, that the sale is *inoperative*, and *void* as to the creditors of the vendor, *Ib.*

6. A conditional, as well as an absolute sale of goods, may be fraudulent as to creditors.—*Gifford* vs. *Ford*, 532

7. The defendant cannot set up fraud, as to his creditors, to avoid the contract, *Ib.*

G

GENERAL ISSUE.

In an action of trespass by A against B, for carrying off a chattel, B, under the general issue, may give in evidence, that at the time of taking, the chattel was in the actual possession of C, and he had the general property in the same: Showing these facts will defeat A's recovery without showing that the chattel was taken on legal process against C when it was carried off.—*Brainard et al.* vs. *Burton et al.* 97

GUARDIAN.

See ADMINISTRATORS, 5.

H

HIGHWAY SURVEYOR.

1. In an action of *trespass de bonis asportatis*, if the defendant took the goods as highway surveyor, it is sufficient to set forth in the plea the authority for the taking—*Andrews* vs. *Chase*, 409

2. If the authority was abused so as to make the defendant a trespasser *ab initio*, such abuse must be set forth in the replication, *Ib.*

3. A highway surveyor duly elected and sworn, is competent to discharge the duties of the office, although it does not appear on record that he was sworn, *Ib.*

4. In collecting a highway tax, the surveyor, after giving three days notice to the person assessed, may, on his neglect, levy and collect the tax by distress, *Ib.*

I

IMPRISONMENT.

1. Where a person is illegally imprisoned, and employs the person who imprisons him to perform a service for the purpose of relieving himself from that imprisonment, the person who performs the service cannot maintain an action to recover a compensation therefor.—*Mattocks* vs. *Owen*, 42

2. If a person, who has an exemption from arrest and imprisonment on civil process, be arrested, and imprisoned in violation of his exemption, he should take the first opportunity to assert his privilege, and obtain his liberty; or his negligence will be construed a *waiver* of his privilege; and he cannot afterwards set up his privilege in an action of trespass, so as to make his arrest and imprisonment *unlawful*, that he may recover damages for false imprisonment.—*Wood* vs. *Kinsman et al.* 588

3. If he be arrested on a writ of attachment, and his exemption be permanent, he should appear at Court, and plead his privilege in abatement of the writ; or if the writ be a summons, he should plead his privilege in bar of an execution against his body Or, if he be imprisoned on a writ of execution, in the life of it, and according to its precept, and this was done at the request of the creditor, or his attorney, by a proper officer, such execution, if it issued on a regular judgement of a Court of Record, and if it were ever so *erroneous*, and not *absolutely void*, will justify the creditor, or his attorney, for procuring said imprisonment, in an action of trespass for false imprisonment brought against them, *Ib.*

jail, from officiating as a Judge or Justice in any case arising under the 12th Section of an Act, entitled, "An Act relating to Jails and Jailers, and for the relief of persons imprisoned therein," will not extend to the doings of a Commissioner of Jail Delivery, who has acted in that capacity while confined to the liberties of the jail-yard.—*Babbit* vs. *Johnson et al.* 599

INCUMBRANCE.

See COVENANT, 2, 3.

INSOLVENCY.

See ADMINISTRATOR, 8, 9.

INTEREST.

That, when there is no contract for the payment of interest on a book account, none is to be cast, except upon the balance, and that only from the time when said balance ought to have been paid.—*Catlin* vs. *Aiken*, 177

INTERROGATORIES.

See BILL IN CHANCERY, 3.

J

JAIL COMMISSIONERS.

The act of the 11th of November, 1818, which prohibits *a Deputy Jailer, or any person who is confined within the liberties of any*

JOINDER OF PARTIES.

1. The non-joinder of one who ought to have been made a plaintiff may be taken advantage of on trial, notwithstanding it may be pleaded in abatement.——*Hillaker* vs. *Loop*, 116

2. In the case of joint owners of property sold by one, the purchaser not knowing that others were interested, an action for the price may be maintained in the name of the person with whom the contract was made, or in the names of the persons interested, *Ib.*

3. If A take a deed of mortgaged premises of the mortgagor, after the law-day has expired, and exercises acts of ownership over the premises, keeping the mortgagee out of possession, A may be joined with the mortgagor, as defendant in an action of ejectment to be brought by the mortgagee to recover possession.—*Warner* vs. *Pate et al.* 166

4. And in such case, A is liable for *mesne* profits, if the land remains unredeemed, *Ib.*

5. To bring an action of ejectment against several persons, who occupy different rooms in the plaintiff's building, is not a misjoinder of defendants—each may plead severally *not guilty* as to the room which he occupies, and *disclaim* as to every other room.—*Marshal* vs. *Wood et al.* 250

See DEFENDANTS, *passim.*

JUDGEMENT.

See DEFENDANT, 3.

JURISDICTION.

1. That any County Court has jurisdiction over a motion or petition to set aside a judgement, rendered by default before such Court, notwithstanding the late statute, carrying petitions for *new trials* to the Supreme Court.—*Scott* vs. *Stewart*, 57

2. A judgement rendered on voluntary confession of the debtor, by a Justice of the Peace, who is related to the creditor within the fourth degree of affinity, is void for want of jurisdiction.—*Hill* vs. *Wait.* 124

3. Although an officer having an execution legal upon its face, issued on such judgement would be justified in levying and collecting the same, yet he is not liable for neglecting so to do. *Ib.*

4. That, when the plaintiff charges no interest on his book account, & nothing appears to render it certain that he is entitled to interest, the jurisdiction cannot be affected by a supposed right to cast interest.---*Catlin* vs. *Aiken*, 177

5. That a charge on the plaintiff's book, which makes the debit side exceed one hun-

dred dollars, but which was made, or posted, by mistake merely, and which is made correct again, by credit of the same matter thus charged, does not take the jurisdiction from a Justice of the Peace, and transfer it to the County Court, *Ib.*

See AD DAMNUM, 1, 2.

JURY.

See TRUSTEE, 1.

JUSTICE OF THE PEACE.

A Justice of the Peace is authorized to administer the oath of office to a town officer out of town meeting.—*Andrews* vs. *Chase*, 409

See JURISDICTION, 2.

JUSTIFICATION.

In a plea of justification under a warrant for the collection of a tax, it is sufficient to state that the warrant was directed to the surveyor by a Justice of the Peace, commanding him, &c., without averring particularly that it was signed by the Justice.—*Andrews* vs. *Chase*, 409

See HIGHWAY SURVEYOR, 1.

L

LEASE.

That, if a defendant, who is lessee of the mortgagor, moves to other premises before the lease expires, that does not prevent his liability to be sued as in possession, unless he surrenders his lease, or at least gives notice to his lessor, that he, for good reasons, is about to leave possession, and abandon his lease.—*Collins et al.* vs. *Gibson et al.* 243

See PRESUMPTION, 3.

LEVY OF EXECUTION.

See EXECUTION, *passim*.
EQUITY OF REDEMPTION, 1, 2.

LIEN.

If A lease land to B for the rent of $50 per annum, and B agrees that A shall have a hold, or lien on the crops raised on the premises until the rent is paid, it is merely an *executory* contract, and by it A acquires no *general* nor *qualified* property in the crops before they are raised and delivered to him by B.—*Brainard et al.* vs. *Burton et al.* 97

See RECEIPTORS, 1.

LIMITATION OF ACTIONS.

1. If in an account between parties, the plaintiff exhibits some items of more than six years standing, and some subsequent, and there appear no credits by the plaintiff nor charges of the defendant within that period, a recovery can be had for the last items only—the others being barred by the Statute of Limitations.—*Chipman* vs. *Bates*, 143

2. Where a Sheriff makes an irregular levy of an execution on real estate, in consequence of which no title passes to the creditor, *held*, that on his failure to make a proper levy, an action may be immediately commenced against him:—That the cause of action is then complete, and that the statute of limitation on the action would commence running from that time. Therefore, when a creditor went into possession under a void levy, and was evicted by the judgement debtor more than six years after the same, the statute of limitations commenced running on the action against the Sheriff from the time of the levy and not from the time of the eviction.—*Hall* vs. *Tomlinson*, 228

3. A part payment of an account barred by the Statute of Limitations, amounts to an admission by the defendant that the account is unsettled, and removes the bar.—*Strong* vs. *McConnel*, 338

See AUDITA QUERELA, 5.

M

MILITIA.

1. That, when a Captain forfeits a penalty, by neglecting to make the returns required by law, in the month of June, and the Commandant demands the fine or penalty within sixty days, he may afterwards issue his execution, although he may have made no record of his having assessed the fine.—*Kingsbury* vs. *Whitney*. 470

2. That the statute does not require such officer to make a record of his proceedings, nor attach any validity to such record, if made. *Ib.*

3. That a recital in the execution, dated September 22d, that defendant was amerced September 20th, in the same year, is well enough, *if it* appear in evidence that the fine had become payable before that time, by neglect of duty, and the making of a regular demand, *Ib.*

4. That, if a Captain be committed on execution for a fine, and give a note payable to the Adjutant for the amount of the fine and cost, and a discharge is written upon the copy left with the keeper of the jail, signed by such keeper, and two years have elapsed without any objection to this proceeding, or any further pursuit of the execution, the jury may presume the assent of all concerned, to the authority of the Adjutant and Jailer, to take such note, *Ib.*

MERGER.

See MORTGAGE.

MESNE PROFITS.

See JOINDER OF PARTIES, 4.

MISTAKE.

See BOOK ACCOUNT, 3, 11.

MOIETY.

See EXECUTION, 2.

MORTGAGE.

1. That the plaintiffs, having a good title against the defendants, who are mortgagor and his lessee, but no title as against the mortgagee, can recover no other damages than merely nominal.—*Collins et al.* vs. *Gibson et al.* 243

2. A promissory note, described in the condition of a mortgage, need not be produced on the trial of an action of ejectment brought on such mortgage; provided the equity of redemption had been released by the mortgagor to the mortgagee in satisfaction of the note.—*Marshall* vs. *Wood et al.* 250

3. Where the release of the equity of redemption is by a warrantee deed, the mortgage is not merged in such deed, where it is not for the interest of the mortgagee to have it merge, *Ib.*

See JOINDER OF PARTIES, 3, 4.
USURY, 6.
BILL IN CHANCERY, 1.

MORTGAGE OF GOODS.

1. Where A was owing B $23, executed a bill of sale, absolute on the face of it, to B, of A's household goods; and at the same time A received back the goods, and gave his receipt for them to B, therein promising to return said goods to B any time after one year on demand: And then and there a parol agreement was made between A and B that the bill of sale should be void, and the title of the goods should revest in A if he paid B the $23 in one year. *Held*, this was a mortgage of A's goods to B to secure the payment of $23 in one year, and if the money was not paid, B's title to the goods became absolute.—*Gifford* vs. *Ford*, 532

2. The difference between a mortgage and pawn of goods considered, *Ib.*

3. The contract being a mortgage, the Court did right in not charging the jury, that it was no more than a simple pledge, or pawn, *Ib.*

4. Trover will lie for the goods, *Ib.*

N

NEGLECT.

See JURISDICTION, 3.
SHERIFF, 1, 2, 3.

NEW TRIAL.

1. That the Court's excluding evidence offered by the plaintiff, after he had pronounced himself thereon, saying it was too late, which evidence was not pertinent to the issue, is no ground for a new trial.—*Gordon* vs. *Tabor*, 103

2. That the Court intimated, that the plaintiff had not made out a *prima facie* case, and afterwards submitted to the jury what evidence there was, is no ground for a new trial, *Ib.*

3. That the Court instruct the jury to decide the cause upon the consideration of two matters only, where there are several others, that should have been coupled with them for their consideration, is ground for granting a new trial. *Ib.*

NOTE.

See CATTLE NOTE.

NOTICE.

See AUDITA QUERELA, 2.
DEPOSITION, 1.

NUISANCE.

1. That an action on the case lies against all jointly, who are concerned in continuing a nuisance, whether they be lessees, or sub-lessees, or assignees of the lessor.—*Rogers* vs. *Stewart et al.* 215

2. That it is no objection to the plaintiff's recovering for a nuisance, that there are other nuisances which obstruct the same way of the plaintiff; especially when the instructions to the jury exclude all damages except those resulting from the joint act of the defendants, *Ib.*

3. That a recovery and collection will be a bar to any other recovery for continuing the same nuisance for the same period, *Ib.*

O

OATH.

See JUSTICE OF THE PEACE, 1.
BOOK ACCOUNT, 11.

OFF-SET.

1. That, when one of the several pleas in offset is defective in substance, and there is a general verdict for the defendant by reason of damages allowed on such pleas in offset, the judgement must be arrested.—*Bloss* vs. *Kittridge*, 28

2. That, in such case the action is not thrown out of Court, but a *venire de novo* is awarded, *Ib.*

3. That, in a suit in favor of the bearer of a note, made payable to L. R., deceased, or bearer, the defendant cannot plead offset against the plaintiff of matters, that stand against the estate of the deceased, by averring that this suit is prosecuted for the benefit of said estate.—*Thompson's* Ad'mr vs. *Lapham, et al.* 204

4. That defendants cannot plead in offset demands they have purchased against the deceased since his death.—

Query—Whether an action in favor of the bearer would not be barred by a plea setting forth that the suit was prosecuted for the benefit of the estate, and that the defendant had claims which he ought to be able to file in offset, *Ib.*

See DEFENDANT, 2.

OUSTER.

See TITLE, 1, 2.

P

PAROL EVIDENCE.

Parol evidence is admissible to show the de-

livery of an execution to a Sheriff, and the time of the delivery, in order to hold property attached, although the officer make no minute on it of the time of serving it as directed by statute.—*Lowry* vs. *Walker*, 181

See EVIDENCE, *passim*.

PARENT AND CHILD.

See EVIDENCE, 12.

PARTNERSHIP.

1. Plea of partnership between the plaintiff & another person, and judgement thereon, does not estop the party from insisting that there was a partnership between the plaintiff and two others. —*Hilliker* vs. *Loop*, 116

2. In the case of dormant partners an action may be brought on an implied contract made with them, either in the name of the acting partner alone, or in the name of all the partners; but if in the name of the latter, the Court will see that the defendant is not deprived of any defence which he would be entitled to, if the action had been brought in the name of the acting partner alone, *Ib.*

3. Where one of the partners retires from a firm, to discharge him from subsequent transactions, *actual* knowledge of the dissolution must be carried home to the creditor with whom there was a previous deal.—*Prentiss* vs. *Sinclair*, 149

Dictum. But a publication in the Gazette of the place where the business of the partnership was transacted, is a sufficient notice of the dissolution to all persons who had no previous connexion. *Ib.*

4. Where a note is made payable to A & B or order, partners, evidence of an indorsement of the partnership name by one of the firm, without an averment of partnership in the declaration, does not meet the averment that "A & B indorsed said note; their own proper hand-writing being to such indorsement."—*Fullerton* vs. *Seymour et al.* 249

PAUPERS.

See TOWNS, *passim*.
SETTLEMENT, do.

PAWN.

See MORTGAGE OF GOODS, 1, 2, 3.

PLEADINGS.

1. The averment in a declaration, that the defendant, by his note under his hand of that date, for value received, promised to pay, &c., implies the delivery of the note.—*Binney et al.* vs. *Plumley*, 500

2. As the words, that the defendant, "by his note in writing under his hand," &c. imply that the defendant made the note, *Ib.*

3. It is not necessary to raise a promise from the defendant's liability to pay the money contained in his note; but the plaintiff may declare that the defendant in, and by his note, promised, &c., *Ib.*

4. If the defendant, in his plea, set forth such facts as shew that he is a trespasser *ab initio*, the plaintiff may demur; but he is not to be so considered because he omits to state in his plea a regular course of proceedings with the goods after taken.—*Andrews* vs. *Chase*, 409

5. If the plaintiffs make an averment in their declaration, which is necessary to be proved; the defendants have a right to disprove it, with suitable evidence.—*Richardson* vs. *Royalton and Woodstock Turnpike Co.*, 580

See PARTNERSHIP, 4.

PLEDGE.

See MORTGAGE OF GOODS, 1, 2, 3.

POSSESSION.

1. That the possession of personal property must be changed, on a sale, to render such sale valid against the creditors of the vendor.—*Moore* vs. *Kelley*, 34

2. That it is not sufficient, that the vendor has moved from the premises where the property is kept, if the same remain under the care of the vendor's servant, and the sale not known even to that servant. *Ib.*

3. If a person enters into possession of land under a pitch, the boundaries of which are well known, and begins in the centre to make improvements, his possession will be as extensive as the boundaries of the pitch.—*Beach* vs. *Sutton*, 209

4. That a sale of personal property, otherwise *bona fide*, must be completed by such a visible and substantial change of possession, as gives notice of the new owner, or it will be liable to the attachments of the creditors of the vendor.—*Judd & Harris* vs. *Langdon*, 231

5. That the purchaser of colts, buys also the farm on which they are kept by a man employed by the vendor, yet neither takes possession of the farm, nor causes his deed to be recorded, makes no sufficient change of possession as against creditors, or purchasers, *Ib.*

See TRESPASS, 2, 3, 5.
FRAUD, 2, 3.
SHERIFF, 4, 6.
TRESPASS, 1, 2, 3, 4.
VENDUE DEED, 1.
GENERAL ISSUE.

PRACTICE.

1. That, if a plaintiff would stop a suit by notice that he should not prosecute the same, given after service of his writ, and before Court, he must give that notice by a writing, that will render the defendant safe without attending Court.—*Wright* vs. *Doolittle*, 390

2. Where the plaintiff is not permitted to prove, that the defendant's action, other than the one on trial, had no merits.—*Fuller* vs. *Sears et al.* 527

See COURT, 1.
REFEREES, *b*.

PRESUMPTION.

1. That the circumstances, admissible in evidence to rebut the presumption of payment, should be such as are in the way of recovering a

judgement, and not merely such as render a collection of the debt improbable, like the poverty of the debtor.—*Rogers* vs. *Judd*, 236

2. That twenty years neglect of collection, is a sufficient period to ground the presumption of payment of a bond, *Ib.*

3. That a lease of land for the life of the lessee may be presumed, as well as any other estate, when the facts proved, are calculated to raise such presumption.—*Selleck* vs. *Starr*, 255

4. That a purchaser, from the original owner, is bound to notice such a possession, and can only hold subject to it, *Ib.*

See VENDUE DEED, 1.

PROPRIETOR'S RIGHT.

That, if the land sued for is not appropriated or set off to any particular proprietor's right, the plaintiff may recover against one, who has no title in town, on proving a title in himself to the after division of any proprietor's right.—*Johnson* vs. *Tilden*, 426

PROBATE BOND.

1. That, in a suit on a Probate Bond for the benefit of a creditor, the breach assigned being the non-payment of a dividend struck in the Probate Court, and on plea of payment, receipts, showing payment to the plaintiff by a former administrator, are admissible in evidence.—*Gordon* vs. *Clapp*, 129

2. That the effect of these receipts as payment cannot be defeated by showing waste, committed by the former administrators, *Ib.*

3. That services performed, or money expended in aid of the defendant's administration, cannot be proved, in support of a suit upon his administration bond, nor to offset against the payments shown by the above mentioned receipts; but are a claim against the defendant in his individual capacity, *Ib.*

PROMISSORY NOTES.

A promissory note given on condition to be in force on the happening of a contingency, cannot be sued before that contingency happens.—*Henry* vs. *Colman*, 402

See BAR, 2.
CORPORATION, 1.
EVIDENCE, 3, 4, 5.
PLEADINGS, 1, 2, 3.

Q

QUESTION OF LAW.

See COURT, 4.

R

RECEIPT.

A receipt in full, executed by a person on the supposition that his claim amounted to a certain sum only, when he had the means of ascertaining the amount, and was informed that the discharge must be a discharge of his whole demand without regard to the sum, will be considered as a discharge of his whole demand, notwithstanding it may amount to a greater sum than was supposed.—*Morgan's* Adm'r. vs. *Blodget*, 520

RECEIPTORS.

If an officer take into his custody personal property by writ of attachment, and a third person receipts the property, and suffers it to go back into the hands of the debtor, the officer, by taking the receipt, does not part with his lien upon the property. But if the officer take the same property into his custody by virtue of a second writ of attachment, and keeps it from the receiptor, this will discharge the receipt.—*Rood* vs. *Scott et al.* 262

RECORDS.

See EXECUTION, 5, 6, 7.

REFEREES.

1. Additional reports and statements from referees, made after the report is filed, unless made by the permission of the Court, are to be discharged.—*Stevens* vs. *Pearson*, 503

2. The Court will not set aside a report, where referees have mistaken the law, unless it appeared that they intended to follow the law, and by mistaking it, have come to a wrong result, *Ib.*

3. Referees are sole judges of facts before them, *Ib.*

4. It is no objection to the report of referees that they have proceeded to trial without the pleadings, when neither party requested to have the pleadings produced, *Ib.*

5. Whether sufficient notice to the parties was given by the referees, is a question to be determined by the Court to whom the report is returned; and their determination thereon is not to be re-examined by a superior Court. *Ib.*

RELEASE.

See DISCHARGE, 1.

REPEAL.

When by the repeal of a law, an inferior tribunal cannot carry their proceedings into full effect, and no mode is prescribed in the repealing statute for that purpose, the proceedings of the inferior tribunal, if not completed, will be wholly set aside.—*Royalton* vs. *Fox et al.* 458

REPORT.

See AUDITORS, *passim*.
REFEREES, 1, 2.

RETURN.

1. The distinction between the return of a Sheriff on a writ which he serves, and the

return of a collector of taxes on his rate-bill or warrant. The return of the Sheriff is an official act done under the oath of his office, and deserves credit; but the return of the collector is not an official act, inasmuch as the law does not require him to make a return on his rate-bill, or warrant.—*Hathaway* vs. *Goodrich*, 65.

2. That, when a purchaser would hold property against an attaching creditor, who has obtained judgement and execution, and such person sues before the writ of such creditor is returnable, he cannot take advantage of any defect in the officer's return.—*Judd & Harris* vs. *Langdon*, 231

3. A return of *non est inventus*, made by an officer, after an execution has run out in his hands, with a view to charge bail on *mesne process*, is a false return.—*Cooper* vs. *Ingalls*, 508

4. When a recovery has been had against the bail, on a writ of *scire facias*, issued against him, and the bail bring an action against the officer for making a false return on the execution, it is no defence to such action that the bail might have successfully resisted the recovery against him, by shewing that the return was false, *Ib.*

See AMENDMENT, 1.
EXECUTION, 4, 5, 6, 7.
SHERIFF'S SALE, 1, 2, 3.

REVIEW.

1. When a suit before a Justice is continued for notice, and the plaintiff, before taking out execution, enters into a recognizance to refund what may be recovered by a writ of review, according to the provisions of the 18th Section of the Justice Act, the party cannot plead in bar to such writ of review that the defendant was in the State at the time judgement was rendered against him.—*Davis* vs. *Beebe*, 560

2. The proceedings of the Justice, in such case, are equivalent to an adjudication that the defendant was out of the State, and had no notice of the suit, *Ib.*

ROAD COMMISSIONERS.

1. On an appeal from the decision of the Board of Road Commissioners, under the act of 1830, it was the duty of the committee to affirm or reverse the order of the Commissioners; and unless they were all agreed to reverse, it was their duty to affirm.—Therefore,

2. Where they only *affirm* an order of the Commissioners, with respect to the erecting and building a bridge, but recommend to build it of a different plan or description than the one ordered by the Commissioners, their proceedings were irregular and were quashed on *certiorari*.—*Town of Royalton* vs *Fox et al.* 468

S

SALE.

See WARRANTY, 1.

SCIRE FACIAS.

A seized and sold property on an execution in his favor against B. C sued A for the same, and while his suit was pending, agreed with A to discontinue it, and release his claim. The suit was discontinued, but afterwards C commenced another suit against A, and recovered the value of said property.—Whereupon, A sued C upon his said agreement for a discontinuance and release, and recovered back of C the same amount which C had recovered of him. Upon a *scire facias* brought by A, for an *alias* execution against B, on the ground of a failure of title in the property sold as aforesaid, *Held*, That the plaintiff was entitled to recover.—*Mack* vs. *Nichols*, 200

See ADMINISTRATOR., 6.

SETTLEMENT.

1. Prior to the statute of 1817, a wife had a derivative settlement from her husband, and children from their father.—*Town of Wells* vs. *Town of Westhaven*, 322

2. When a widow gained a settlement in her own right, her minor children living with her, took her settlement, *Ib.*

3. But when a widow gained a settlement by marriage, her children by a former marriage did not follow her settlement thus obtained, *Ib.*

4. While the act of 1801, in relation to warning out was in force, it was not necessary to warn out minor children living with either of their parents, to prevent their gaining a settlement, *Ib.*

5. A female child being with her mother in the family of her father-in-law, for more than a year, without being warned, did not thereby gain a settlement in her own right, *Ib.*

6. A child, who has not been *emancipated* will derive a settlement from his father; and if his father dies, and his mother subsequently acquires a new settlement, by one year's residence in town, without being warned out, the child then derives a settlement from that of his mother.—*Town of Bradford* vs. *Town of Lunenburgh*, 481

7. But if before the mother acquires her new settlement, the child is of age; or has married; or has gained a settlement for himself; or has contracted any relation inconsistent with the relation of parent and child, and by which the mother loses her government over him; then he is *emancipated*, and cannot derive a settlement from that of his mother subsequently acquired, *Ib.*

8. That a man's receiving aid, while a prisoner, from the town where the prison *is* located, on a previous pledge of sufficient personal property to secure a remuneration, does not prevent his gaining a settlement by seven years residence in the town from which he is brought to prison.—*Town of Montpelier* vs. *Town of Calais*, 572

SHERIFF.

1. That a Sheriff is liable for the official neglect of his deputy, but not for the per-

formance of any unofficial contract, he may make.—*Wetherby* vs. *Foster*. 136

2. That the setting forth a promise of the Deputy to take property on an execution, does not vitiate, if the other allegations are sufficient to show a neglect to take property, exposed to the execution. *Ib.*

3. That the creditor's taking back an execution from an officer, so as to prevent his completing his duty, would discharge the officer from further liability. But the taking back the execution after the officer is liable for neglect, and causing a partial collection of his debt, has no such effect. It operates in favor of the officer. *Ib.*

4. An attachment made pursuant to the Statute of Nov. 6, 1817, gives a sufficient title to the officer to enable him to maintain trover, although he do not take actual possession.—*Lowry* vs. *Walker*. 181

5. In trover by a Sheriff, for property attached, proof of a fraudulent purchase by the defendant, of the debtor, of the goods in question is admissible as explaining his acts in intermeddling with the property. *Ib.*

6. If an officer attach goods, and afterwards sell the same on an execution, and the purchaser take the receipt of a third person in whose possession they are, for the same, trespass may be sustained against the officer, if the property was not liable to attachment. —*Hart* vs. *Hyde*. 328

See VERDICT, 1.
LIMITATION OF ACTIONS, 2.
RECEIPTORS, I.
EXECUTION, 4.
RETURN *Passim*.
JURISDICTION, 3.
PAROL EVIDENCE, 1.
COLLECTOR OF TAXES, 3.

SHERIFF'S SALE.

1. A purchaser of personal property at a Sheriff's sale, will hold the same, although the officer makes no return on the execution, that previous to the levy upon the same, he demanded the money of the debtor *Sed Quære* as to real estate.—*Bates* vs. *Carter*. 602

2. In such case, it seems that the purchaser will acquire a good title, although the officer is liable to the debtor by reason of defects in his return on the execution. *Ib.*

3. Where personal property, purchased at a Sheriff's sale, is left in the custody of the execution debtor, it is not liable to attachment for his debts. *Ib.*

SURETY.

1. That, where five sureties of an insolvent principal confess a joint judgement, and execution issues, and four are committed to prison, and give separate bonds to the keeper of the jail, and then procure the property of the fifth to be sold to satisfy the original execution; he has his action against each one to recover a fifth part of the amount paid.—*Foster* vs. *Johnson*. 60

2. That in the above case one of the four, thus committed and liberated on bonds, is a competent witness for the plaintiff against another, who is defendant, *Ib.*

3. That the plaintiff need not give notice and make demand before the commencement of his action, when the defendant caused the measures, which compelled the plaintiff to pay the money, which he now seeks to recover back. *Ib.*

4. If A. execute a note at the Bank as surety for B. & C. and B. abscond before it falls due, and A. knowing the fact, call on C. and get him to renew the note without disclosing it, yet if A. ultimately pay the Bank, he can recover the amount of C. and this although as between B. & C. the latter was entitled to indemnity.—*Warner* vs. *Hall*. 156

See EVIDENCE, 4.

SURRENDER.

See LEASE, 1.

T

TENANTS IN COMMON.

1. That one tenant in common cannot maintain trespass *quare clausum fregit* against his co-tenant in common, while such tenancy continues.—*Wilkins* vs. *Burton*. 76

2. That there may be a tenancy in common of an inchoate as well as of an absolute title. *Ib.*

3. Where several creditors extend their executions each upon an undivided moiety of their debtors land, they become tenants, in common thereof.—*Winvall* vs. *Wilkins*. 87

4. Where one of several co-tenants is in the occupancy of lands, he must be considered as possessing not only for himself, but for the others, although there does not appear to be any contract or agreement between them. *Ib.*

5. A co-tenant in possession, not denying the right of other cotenants to a participation in the profits, is liable to be called to account by each, therefor. *Ib.*

7. That, whether the plaintiff's title is of a large or small undivided portion of the land, makes no difference. He has a right to oust the defendant a stranger to title, and hold for the benefit of all the tenants in common. *Ib.*

7. That such title is defeated by defendant's showing himself to have title as tenant in common, unless plaintiff can show an ouster by the defendant; in which case the plaintiff should only recover to be let in as tenant in common. *Ib.*

8. That defendant's receiving a deed of the whole lot, and taking possession, and claiming the whole in his own right, is a sufficient ouster; and the plaintiff need not prove a demand of possession.

TENDER.

1. When the parties' son was sent to demand a specific amount on an unliquidated

claim, an offer made him by the other party of a less sum, cannot be regarded as a legal tender to the father.—*Chipman* vs. *Bates*. 143

2. In a suit originally commenced before a Justice of the Peace, appealed to the County Court, and there ruled out to a reference; *held*, that a tender not having been made before the Justice, nor at the County Court, could not avail the defendant before the referee. *Ib*.

TOWNS.

1. The obligation on a town to support their poor arises from the Statute alone.—*Aldrich* vs. *Londonderry*. 441.

2. No action can be maintained against a town at the suit of an individual on the general provisions of the Statute declaring it to be the duty of a town to support their own poor; nor will any action lie against them for support afforded to a pauper unless it was afforded at their request, or unless there has been a subsequent promise to pay. *Ib*.

3. When the overseers of the poor contract with any individual to support a pauper for a year, he is under no obligation to support for a longer period. *Ib*.

4. If the individual supports the pauper after his year has expired, no action can be maintained against the town therefor, on the ground that they neglected to take the pauper away. *Ib*.

TOWN CLERK.

See Execution, 5, 7.

TRESPASS.

1. A to maintain trespass against B. for taking a personal chattel, must prove, that at the time of taking, he had an *actual* or *constructive possession* of the chattel; and also a *general* or *qualified* property in the same.—*Brainard et al* vs. *Burton et al*. 97

2. The owner of property who has by contract parted with the possession for a given time, cannot maintain an action of trespass against any one, who takes it from the person who is entitled to the possession while the contract is in force.—*Soper* vs. *Sumner et al*. 274

3. Nor can the owner maintain such action because he has a right to put an end to the contract and resume the possession before he does determine the contract. *Ib*.

4. Nor can he maintain such action, because the person who took the property from the possession of the bailee may have so conducted as to make himself as to the bailee a trespasser *ab initio*.

5. To deprive the general owner of chattels of the action of trespass by reason of a possession of another, it must appear that the former has parted with the *right of possession* for a specific time.—*Hart* vs. *Hyde*. 328

See Pleadings, 4.
Sheriff, 6.
Highway Surveyor, 1, 2.

TRUSTEE ACTION.

1. A trustee of an absconding debtor has no right to a trial by jury as to the question whether he has effects or not.—*Huntington* vs. *Spooner's Trustee*. 186

2. Nor a right of review from a judgement that he has effects. *Ib*.

3. Other evidence than the disclosure is admissible to charge the trustee. So his disclosure may be contradicted. *Ib*.

TRUSTEES.

See Corporation, 1, 2.

TURNPIKE COMPANY.

1. Where the charter of a turnpike company makes them liable to pay all damages, which may happen to any person from neglect of any bridge, the company is not liable for damages, if they build and constantly maintain a bridge of sufficient strength for all ordinary purposes, and the same is broken down, and private damages sustained by carelessly over-loading the bridge with cattle.—*Richardson* vs. *Royalton and Woodstock Turn Pike Company*, 580

2. The company is not liable for accident. *Ib*.

U

USURY.

1. Usury avoids a contract in equity as well as at law.—*McDaniels* vs. *Barnum*. 279

2. When a party in a court of equity attempts to enforce an usurious contract, the usury may be set up as a defence. *Ib*.

3. But when a party applies to the *Court* to be relieved from an usurious contract, equity will interfere, only on his paying the sum actually due. *Ib*.

4. When usury is relied on, to avoid a contract, it must be fully proved. *Ib*.

5. To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defence, is not to be taken as evidence for him, unless the plaintiff asks for a disclosure on that subject, but is only equivalent to a plea of the statute of usury. *Ib*.

6. When a person has assigned a mortgage and notes payable to himself to raise money for another, and on a bill to foreclose, testifies that he was agent for the mortgagor, and that the contract on which the money was advanced was usurious, the *Court* will not decree that the notes and mortgage are void on his testimony alone, when it appears that he came before the master with a prepared deposition, a part of which had been written by the defendant requesting him so to testify, and when his testimony is at variance in some material parts with the testimony of other witness, although his general character is unimpeached. *Ib*

7. That a demurrer to a discovery of usu

ry, charged in a bill, must be allowed, unless the person demurring waives the forfeiture, and seeks only to be relieved against the usurious part.—*Shed* vs. *Garfield et al.* 39

8. That the Court will not admit a plea of usury, presented, out of time without a waiver of the forfeiture.

V

VARIANCE.

See ATTACHMENT, 3.

VENDUE DEED.

1. If a person take possession of land under a vendue deed, twenty-three years old, without previously setting up any claim of title to said land, and holds possession five years under said deed, the age of the deed, and possession under it, raise no presumption, that the deed is a valid one.—*Richardson* vs. *Dorr*. 9

2. A collector of taxes, who has given a vendue-deed of lands, which he sold, and has covenanted in such deed, *to warrant and defend the same*, is interested, and cannot be a witness to support the title without a release. *Ib.*

3. A copy of vendue sales, lodged in the county clerk's office, which carried *internal* evidence, that it was not left in said office within thirty days next after the sales, and was not attested to by the collector, as a true copy, as the statute required, was rightly excluded by the county court from going to the jury as evidence. *Ib.*

VERDICT.

That, in a suit against a Sheriff for neglect to levy upon personal estate, such a defective setting forth of the articles and their value, as might be bad on demurrer, is cured by a verdict for the plaintiff.—*Wetherby* vs. *Foster*. 136

See AUDITA QUERELA, 3.

VENIRE DE NOVO.

See WARRANTY, 2.
OFFSETT, 1.

VI ET ARMIS.

That the omission of *vi et armis* in an action of trespass, does not vitiate in this state, unless met by a special demurrer.—*Higgins et al* vs. *Hayward*. 73

W

WAIVER.

See COPY, 1.
USURY, 7, 8.

WARNING.*

1. In a warning under the Statute of 1801, to prevent a person from obtaining a settlement, it is not a fatal defect if the direction is in these words, "Hereof fail not, but of your doings hereon make due return, &c., omitting the words "of this precept with," &c.—*Dummerston* vs. *Jamaica*. 399

2. When a warning issues against a man and his wife, it is sufficient to serve the same on the husband alone. *Ib.*

3. If the warning is against a person residing in a town therein named, the service is good if it is made on a person of that name in the town, if no evidence is given that more than one person of that name resided in the town. *Ib.*

See SETTLEMENT, 4, 5.

WARRANTY.

That a count upon a warranty, made after a sale is complete, is bad after a verdict, for want of consideration.—*Bloss* vs. *Kittridge*. 28

WAY.

1. That the neglect of the plaintiff, for seven or eight years merely, to cause a house to be removed from his own land, which was wrongfully erected there, and which obstructs the plaintiff's way, is not an abandonment of the way. Had the plaintiff himself, erected such a house, it might have been proper evidence of such abandonment.—*Rogers* vs. *Stewart et al*. 215

2. That the plaintiff is entitled to his entire damage for the entire obstruction of his way by the defendants, notwithstanding there are other obstructions to the same way, erected by other persons; and he is not to be virtually driven to an apportionment of his damages upon the different encroachments upon the same way. *Ib.*

See NUISANCE, 1, 2.

WITNESS.

A., a common carrier, received money to carry, and deliver to B., a common carrier, for him to transmit to C., the owner. C. sues A. for the loss of the money, and after A. had given evidence tending to prove that he delivered the money to B., as he was directed, C. offered B. as a witness to prove that he did not receive the money.

Held, that B. had a deep interest in the *particular question* agitated at the trial, and could not testify, without a release from C.—*Dennison* vs. *Hibbard*. 496

See VENDUE DEED, 3.
DEPOSITION, 2, 3.
ATTORNEY, 6.
DEED, 2.

WOOD AND TIMBER.

1. A. acquires no property in wood and timber by their floating in the water over his

land. But A. has an *exclusive* right to seize wood, and timber, floating and moving in an eddy, over his land; and to convert such wood, and timber to his own use; unless the owner in a reasonable time claims the same. —*Rogers* vs. *Judd*. 223

2. If B. who is not the owner, seize wood and timber, floating in an eddy, over the land of A., this is more than a trespass upon the freehold; it is a violation A's *exclusive* right to seize the wood and timber himself; and in an action of trespass for this injury, the plaintiff should recover the *value* of his chance to seize, and enjoy the wood and timber, which *chance* he had lost by the seizure made by B. *Ib.*

WRITTEN CONTRACT.

See EVIDENCE.

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